(1)

Supreme Court, U.S.
FILED

No. 02 492

SEP 24 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN NOLEN, individually and on behalf of all persons similarly situated,

Petitioner,

versus

NUCENTRIX BROADBAND NETWORKS, INC., a/k/a Heartland Wireless Communications, Inc., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRYAN POWERS
BRYAN POWERS, P.C.
P.O. Box 260968
Corpus Christi, TX 78426
(361) 767-9970
(361) 767-9971

DAVID A. FURLOW
Counsel of Record
KELLYE R. KOEHN
THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3300
Houston, TX 77002
(713) 654-8111
(832) 397-8253

Attorneys for Petitioner John Nolen

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

14/1PP

QUESTIONS PRESENTED

1. Whether a fixed charge for a late fee by a Texas cable television company constitutes an "unlawful debt" actionable under RICO 18 U.S.C. § 1962(c)?

2. Whether injunctive and declaratory relief is available to private parties under RICO, 18 U.S.C. § 1964(a) and (c), as decided in *National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 122 S.Ct. 1604 and 122 S.Ct. 1605 (April 22, 2002), which is in direct conflict with *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (denying injunctive relief) and the results in this and other Fifth Circuit cases?

3. Whether this Court should grant certiorari in this case involving the availability of injunctive and declaratory relief under RICO, 18 U.S.C. § 1964(a) and (c), so that this case can be decided in a manner consistent with this Court's consideration of the same issues in *National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 122 S.Ct. 1604 and 122 S.Ct. 1605 (April 22, 2002) (recognizing the availability of injunctive and declaratory relief), which is in direct conflict with *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (denying injunctive relief) and the results in this and other Fifth Circuit cases?

4. Whether an injury under RICO which flows from the defendant's *use* of racketeering income rather than the *investment* of racketeering income is actionable under RICO, 18 U.S.C. § 1962(a), in light of this Court's recent decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087 (2001)?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: John Nolen ("Nolen"), acting on behalf of himself and all similarly situated persons.

Respondents: Nucentrix Broadband Networks, Inc. a/k/a Heartland Wireless Communications, Inc., its marks and assumed names; Nucentrix Telecom; Heartland Cable Television, Inc.; Nucentrix Internet Services; Nucentrix Spectrum Resources, Inc.; Nucentrix Telephone; Cyberwave Heartnet; Clear Choice TV; Nucentrix Internet Services, Inc.; Spectrum Resources, Inc.; Wireless One, Inc.; CS Wireless Systems, Inc.; CAI Wireless Systems, Inc.; Stephen Feinburg; Cerberus Partners, L.P.; Cerberus International, Ltd.; Cerberus Institutional Partners, L.P., its Joint Ventures and Alliance Members; DirecTv, Inc.; Hughes Electronics Corporation; Cross-Country Wireless, Inc.; Rural Vision Joint Venture, its Officers and Directors; Carroll D. McHenry; Marjean Henderson; Amy E. Ivanoff; Richard B. Gold; Terry S. Parker; Neil S. Subin; R. Ted Wechsler; Robert S. Cecil; Jack R. Crosly; J. R. Holland, Jr.; John A. Sprague; L. Allen Wheeler; ISP Alliance, Inc.; Wireless Enterprises, L.L.C.; Peoples Choice TV Corp.; and Unidentified John and Jane Doe Parties 1-34.

CORPORATE DISCLOSURE STATEMENT

Petitioner John Nolen is not a non-governmental corporation but an individual, and thus does not fall within the scope of S.Ct. Rule 29.6

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. General background and description of the parties	3
B. John Nolen alleged that the Nucentrix Respondents collected unlawful debt in violation of the RICO statute	4
C. Respondent Nucentrix Challenged Nolen's RICO claims in the District Court	6
D. The Fifth Circuit affirmed the District Court's dismissal of Nolen's RICO claims	7
E. This Court recently granted certiorari on similar RICO injunctive and declaratory relief issues	8

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 10

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S CIVIL RICO CLAIMS BECAUSE THE NUCENTRIX RESPONDENTS COLLECTED UNLAWFUL DEBTS IN VIOLATION OF RICO 10

II. THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S 18 U.S.C. § 1962(a) RICO CLAIM BECAUSE NOLEN SUFFERED COGNIZABLE USE-OF-RACKETEERING-INCOME DAMAGES 17

III. THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S 18 U.S.C. §§ 1964(a) AND 1964(c) CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE THOSE ARE COGNIZABLE CIVIL RICO CLAIMS 20

CONCLUSION 26

APPENDIX

App. 1:
Fifth Circuit Court Opinion in this case, June 26, 2002 ..... App. 1

TABLE OF CONTENTS – Continued

Page

App. 2:
District Court Order Denying Plaintiff's Motion to Alter or Amend Judgment, Signed June 29, 2001, entered July 2, 2001 ..... App. 8

App. 3:
District Court Order of Dismissal, Signed June 13, 2001, Entered June 14, 2001 ..... App. 10

App. 4:
Rivera v. AT&T Corp., 141 F. Supp.2d 719 (S. D. Tex. 2001) ..... App. 13

App. 5:
Fifth Circuit Order Denying Motion for Rehearing En Banc in the *Rivera* Appeal, Cause No. 01-40953, April 29, 2002 ..... App. 28

App. 6:
Fifth Circuit Opinion in the *Rivera* Appeal, Cause No. 01-40953, March 25, 2002 ..... App. 30

App. 7:
Excerpts from the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ..... App. 32

App. 8:
Excerpts from the Texas Finance Code ..... App. 39

App. 9:
District Court Docket Sheet ..... App. 40

App.10:
Plaintiff's Original Complaint in the District Court, October 19, 2000 ..... App. 68

TABLE OF CONTENTS – Continued

Page

App. 11:
Plaintiff's Amended Complaint in the District Court, May 28, 2001 ..... App. 87

App.12:
Petitioner's Notice of Appeal in the District Court, July 13, 2001 ..... App. 105

TABLE OF AUTHORITIES

Page

CASES

Avirgan v. Hull, 691 F. Supp. 1357 (S.D. Fla. 1988), *aff'd*, 1932 F.2d 1572 (11th Cir. 1991) 17

American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985) (per curiam) 9, 18, 23

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1983), *aff'd on rhg.*, 710 F.2d 1362 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983) 24, 25

Blue Cross of W. Penn. v. Nardone, 680 F. Supp. 195 (W.D. Pa. 1988) 17

Bolin v. Sears, Roebuck & Co., 231 F.3d 970 (5th Cir. 2000) 25

Busby v. Crown Central Supply, 896 F.2d 833 (4th Cir. 1990) (*en banc*) 17

Catalina v. Blasdel, 881 S.W.2d 295 (Tex. 1994) ... 14, 15, 16

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) ..... *passim*

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 18

Crowe v. Henry, 43 F.3d 198 (5th Cir. 1985) 7, 17

Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983) 20

Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239 (2d Cir. 1985) 12

ECE Technologies, Inc. v. Cherrington Corp., 168 F.3d 201 (5th Cir. 1999) 14, 16

Engineering Tech. Analysts, Inc. v. Robray Offshore Drilling Co., 611 F.2d 540 (5th Cir. 1980) 14, 16

TABLE OF AUTHORITIES – Continued

Page

First USA Mgmt., Inc. v. Esmond, 960 S.W.2d 625 (Tex. 1997) 13, 16

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 20, 25

Goold Electronics Corp. v. Galaxy Electronics, Inc., 1993 U.S. Dist. LEXIS 15009, 1993 WL 427727 (N.D. Ill. 1993) 17

Motorola Credit Corp. v. Uzan, 202 F. Supp.2d 239 (S.D. N.Y. 2002) 9, 20, 21, 22, 25

National Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir.), *rhg. denied and denied en banc*, 2001 U.S. App. LEXIS 23758 (7th Cir. Oct. 29, 2001), *cert. granted*, 122 S.Ct. 1604 and 122 S.Ct. 1605 (2002) ..... *passim*

Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al., No. 01-40808 (5th Cir. June 26, 2002) 7

Omega Constr. Co. v. Altman, 667 F. Supp. 453 (W.D. Mich. 1987) 18

Parker & Parsley Petroleum Co. v. Dresser Indus., Inc., 972 F.2d 580 (5th Cir. 1992) 7, 17, 18

Price v. Pinnacle Brands, Inc., 138 F.3d 602 (5th Cir. 1998) 20, 25

Potomac Elec. Power Co. v. Electric Motor & Supply Co., 262 F.3d 260 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 1297 (U.S. 2002) 17

Preston Farm & Ranch Supply v. Bio-Zyme Enterprs., 625 S.W.2d 295 (Tex. 1981) 14

Religious Technology Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 9, 20, 21, 22, 25

TABLE OF AUTHORITIES – Continued

Page

Rivera v. AT&T Corp., 141 F. Supp.2d 719 (S.D. Tex. 2001), *aff'd sub nom. Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002) (unpublished) ..... *passim*

Rotella v. Wood, 528 U.S. 549 (2000) 19, 24

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) ..... *passim*

St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425 (5th Cir. 2000) 7, 18

Steve's Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473 (Tex. 1988) 13

United States v. Oreto, 37 F.3d 739 (1st Cir. 1994) 11

United States v. Turkette, 452 U.S. 576 (1981) 23

Windhorst v. Adcock Pipe Supply Co., 547 S.W.2d 260 (Tex. 1977) 13

FEDERAL STATUTES

The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 ..... *passim*

18 U.S.C. § 1961(6) 11, 12

18 U.S.C. § 1962(a) ..... *passim*

18 U.S.C. § 1962(c) 11

18 U.S.C. § 1964(a) 1, 2, 8, 20

18 U.S.C. § 1964(c) 1, 2, 8

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1291 2

28 U.S.C. § 1331 ..... 1, 2

TEXAS STATUTES

TEX. FINANCE CODE ANN. § 302.001 (Vernon's Supp. 2002) 13

TEX. FINANCE CODE ANN. § 302.001(a) (Vernon's Supp. 2002) 13

TEX. FINANCE CODE ANN. § 302.001(b) (Vernon's Supp. 2002) 13

TEX. FINANCE CODE ANN. § 302.001(c) (Vernon's Supp. 2002) 13

TEX. FINANCE CODE ANN. § 302.001(d) (Vernon's Supp. 2002) 13

TEX. FINANCE CODE ANN. § 305.001 (Vernon's Supp. 2001) 4

TEX. REV. CIV. STAT. ANN. arts. 5069-101(d) (Vernon 1987) 12

TEX. REV. CIV. STAT. ANN. arts. 1.06(1)-(2) (Vernon 1987) 12

RULES OF FEDERAL CIVIL AND APPELLATE PROCEDURE

FED. R. CIV. P. 12(b)(6) 2, 6, 8, 16

SUP. CT. R. 10(a) 10

SCHOLARLY AUTHORITIES

Colleen A. Coyne, "Banking Law," 48 SMU L. REV. 781 (May-June 1995) 16

PETITION FOR A WRIT OF CERTIORARI

JOHN NOLEN, individually and on behalf of all persons similarly situated, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This is a dispute involving a class action civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Apps. 1 and 2. This matter began when John Nolen, individually and on behalf of all persons similarly situated, filed an Original Complaint on October 19, 2000, before the United States District Court for the Southern District of Texas, Laredo Division. App. 10. He invoked jurisdiction through 18 U.S.C. §§ 1964(a) and (c) and 28 U.S.C. § 1331. *Id.* and App. 10, pp. 68-70. The District Court assigned the case to the Honorable Judge Keith P. Ellison, who presided over the case. Nolen alleged that Respondent Nucentrix Broadband Networks, Inc. and the other Respondents in this suit (collectively, the "Nucentrix Defendants") had violated RICO by collecting a series of unlawful debts from Nolen and similarly situated persons. *Id.*

The Nucentrix Respondents countered by filing numerous motions to dismiss Nolen's RICO claims. While the Nucentrix Respondents' motions to dismiss were pending, the District Court dismissed a factually and legally similar RICO lawsuit brought by the same attorneys representing Nolen on behalf of a separate class of Plaintiffs involving Thomas A. Rivera, *et al. See Rivera v.*

AT&T Corp., 141 F. Supp.2d 719 (S.D. Tex. 2001), App. 4, p. 13. Based on its decision in *Rivera*, the District Court dismissed Nolen's claims for failure to state a claim upon which relief could be granted under FED. R. CIV. P. 12(b)(6). App. 3, p. 10. Judge Ellison later denied Nolen's motion to alter or amend the judgment. App. 2, p. 8.

Nolen timely filed his Notice of Appeal on July 13, 2001, and requested that the United States Court of Appeals for the Fifth Circuit reverse and remand the District Court's erroneous final judgment. App. 12, p. 105. On June 26, 2002, relying on its March 25, 2002 affirmation of the *Rivera* dismissal (App. 6, p. 30), and its April 29, 2002 denial of Thomas Rivera's motion for en banc reconsideration of that affirmation (App. 5, p. 28), the Fifth Circuit affirmed Judge Ellison's dismissal with prejudice of Nolen's RICO claims. App. 1.

JURISDICTION

Subject matter over the final judgment is found under 28 U.S.C. § 1291.

Subject matter jurisdiction for the United States District Court for the Southern District of Texas was founded on 18 U.S.C. §§ 1964(a) and (c) and on 28 U.S.C. § 1331.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968.

STATEMENT OF THE CASE

A. General background and description of the parties.

Nolen is a Texas citizen living in Duval County, in the Southern District of Texas. He has subscribed to the Nucentrix Broadband Networks, Inc. ("Nucentrix") and its predecessor since August 1996. Nucentrix sells subscription television services, including programming and Pay-Per-View events, and rents related receiving equipment to users in Texas, Oklahoma, Arkansas, Kansas, Missouri, Iowa, Illinois, Ohio, Indiana, Kentucky, and Pennsylvania. It directly or indirectly operates, manages, or controls broadband networks within the Laredo Division of the Southern District of Texas, including one in Laredo, Webb County, Texas. As alleged in Mr. Nolen's Original Complaint and First Amended Complaint, Nucentrix conducts its local business under a variety of assumed names, *e.g.*, Nucentrix Telecom, Hartland Cable Television, etc. *See* Apps. 10-11, pp. 87-115.

Nucentrix provides cable services pursuant to an agreement in which the subscribers agree to pay a monthly fee for the use of cable equipment as well as cable programming content. *Id.* and App. 1. Depending on the particular mix of equipment and programming purchased, an average customer's bill can range from $16.70 to $141.90. The agreement further provides that customers

must pay a fee between $3.00 and $5.00 if they are delinquent in making one of their monthly payments. This "late fee" could constitute up to thirty percent of the amount actually due at the end of the month. During the four years preceding the filing of this suit, Nolen received Nucentrix notices of $5.00 late service charges on at least two occasions, including November 27, 1999. Nolen paid these late fees.

B. John Nolen alleged that the Nucentrix Respondents collected unlawful debt in violation of the RICO statute.

Nolen filed his Original Complaint and Amended Complaint in the U. S. District Court for the Southern District of Texas, Laredo Division. Apps. 10 & 11. Nolen alleged that Respondents violated RICO, 18 U.S.C. §§ 1961-1968, by collecting unlawful debts under Texas usury law, specifically, TEX. FINANCE CODE ANN. § 305.001 (Vernon Supp. 2001).

Specifically, Nolen's Amended Complaint alleged that Nucentrix operated its broadband networks by and through separate and distinct corporate subsidiaries (the "Nucentrix Subsidiaries"), *i.e.*, Nucentrix Internet Services, Inc.; Hartland Cable Television, Inc.; Nucentrix Spectrum Resources, Inc.; Wireless One, Inc.; CS Wireless Systems, Inc.; and thirty-four other related companies or wholly-owned subsidiaries.

Nolen's Amended Complaint also alleged that Nucentrix's officers, directors and owners controlled the operation of Nucentrix. The named officers and directors (the "Nucentrix Respondents' Officers") included Curtis Henderson; Carroll D. McHenry; Marjean Henderson; Amy E.

Ivanoff; Richard B. Gold; Terry S. Parker; Neil S. Subin; R. Ted Wechsler; Robert S. Cecil; Jack Crosly; J. R. Holland, Jr.; John A. Sprague; and L. Allen Wheeler. The named Nucentrix owners (the "Nucentrix Owners") included Stephen Feinburg; Cerberus Partners, L.P.; Cerberus International LTD.; and Cerberus International Partners, L.P.

In his Amended Complaint, Nolen claimed that certain associates of Nucentrix participated in Nucentrix's operation and control. Nolen alleged that those associates (the "Nucentrix Associates") participated in Nucentrix's operations and controlled by engaging in, *inter alia*, the following acts:

(1) Providing management services to Nucentrix;

(2) Setting prices for Nucentrix's services;

(3) Supplying television programs to Nucentrix;

(4) Broadcasting radio signals to Nucentrix; and

(5) Negotiating programming and marketing services with suppliers of Nucentrix's programming.

Those associates allegedly included DirecTV, Inc.; Hughes Electronics Corporation; General Motors Corporation; Cross Country Wireless, Inc.; Rural Vision Joint Venture; ISP Alliance, Inc.; SBA Towers, Inc.; Wireless Enterprises, L.L.C.; and Peoples Choice TV Corp. Nolen subsequently dismissed his appeal against several of these parties, e.g., General Motors Corporation, Cisco Systems, and SBA Towers, Inc.

C. Respondent Nucentrix Challenged Nolen's RICO claims in the District Court.

As discussed above, the Nucentrix Respondents filed numerous motions to dismiss Nolen's Original and Amended Complaints, Apps. 10 & 11. Nolen responded to those motions to dismiss by arguing and citing authorities intended to show that Respondents were offering erroneous interpretations of the relevant FED. R. CIV. P. 12(b)(6) standards and the substantive law of unlawful debt giving rise to civil RICO claims. In an effort to address Respondents' stated concerns, Nolen filed an Amended Complaint. App. 11, pp. 87-104. Several Respondents renewed their motions to dismiss, alleging that Nolen's Amended Complaint also failed to state a cause of action, cognizable under FED. R. CIV. P. 12(b)(6).

Judge Ellison granted Respondents' motions to dismiss Nolen's case with prejudice on June 13, 2001 pursuant to FED. R. CIV. P. 12(b)(6). App. 3, p. 10. In that same Order, Judge Ellison granted Nolen leave to file his Amended Complaint. *Id.* Judge Ellison thus dismissed all of Nolen's claims with prejudice, including those in his Original and Amended Complaints. *Id.*

Nolen also filed Plaintiff's Motion to Alter or Amend the Order of Dismissal, while contending that the District Court had violated the standards governing FED. R. CIV. P. 12(b)(6) by failing to consider that all material facts alleged in his complaint were true; failing to reasonably infer facts establishing that Respondents had violated Texas usury law; failing to note that the Nucentrix enterprise existed as an entity separate and apart from the Respondents; and failing to note that Nolen's injuries flowed from the use or investment of racketeering income

under 18 U.S.C. § 1962(a), etc. Judge Ellison denied the motion on June 29, 2001. App. 2, pp. 8-9. Nolen timely filed his Notice of Appeal on July 13, 2001. App. 12, p. 105.

D. The Fifth Circuit affirmed the District Court's dismissal of Nolen's RICO claims.

On June 26, 2002, the Fifth Circuit affirmed the district court's dismissal of Nolen's claims. *See Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al.*, No. 01-40808 (5th Cir. June 26, 2002) (the "Opinion Below"). In so doing, the Fifth Circuit relied on a factually and legally similar case, *Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002) (unpublished), in which the same district court held that "[a] fixed administrative or legal fee charged under a rental agreement is not regarded as interest under Texas law," and, therefore, Nolen failed to establish that Respondents had collected an "unlawful debt" under RICO. *See Rivera v. AT&T Corp.*, 141 F. Supp.2d 719, 274 (S.D. Tex. 2001) *aff'd sub nom. Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002) (holding "late fees charged are not construed as 'interest' under Texas usury law").

Additionally, the Fifth Circuit held that Nolen suffered no cognizable injury under 18 U.S.C. § 1962(a). *See* App. 1, pp. 5-6. The court held that "any [actionable RICO] injury must flow from *the use of investment of racketeering income.*" *Id., citing St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000); *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1985); and *Parker & Parsley Petroleum Co. v. Dresser Indus., Inc.*, 972 F.2d 580, 584 (5th Cir. 1992). Ultimately, the District Court held that Nolen failed

to assert a valid claim under § 1962(a), as a matter of law, holding that Nolen's injury stemmed "solely from Nucentrix's assessment and collection of late fees, not from Nucentrix's use or investment of those fees." *Id.* at 6.

Finally, the Fifth Circuit refused to recognize that Nolen had pled a valid claim for injunctive and declaratory relief under 18 U.S.C. §§ 1964(a) and (c) when it affirmed the District Court's dismissal of Nolen's claim with prejudice under FED. R. CIV. P. 12(b)(6). The Fifth Circuit refused to even discuss the issue. App. 1. The issue was clearly before the Fifth Circuit, for, Nolen pled it in COUNT IV of his Amended Complaint, under the heading "Injunctive and Declaratory Relief to Prevent RICO Violations." App. 11, p. 101, ¶¶ 57-58. This very issue will soon be argued before this Court in *National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 122 S.Ct. 1604 and 122 S.Ct. 1605 (April 22, 2002).

E. This Court recently granted certiorari on similar RICO injunctive and declaratory relief issues.

The Fifth Circuit's refusal to recognize, *inter alia*, the validity of Nolen's claims for injunctive and declaratory relief in this case widens the divide between the circuits on this very important RICO issue. This Court recently granted certiorari in *National Org. for Women, Inc. v. Scheidler*, to resolve the split between the Seventh Circuit and the Ninth Circuit on the issue of whether injunctive relief is available to a private plaintiff bringing a civil action under RICO. As this case demonstrates, the divide between the Seventh and Ninth Circuits also extends to the Second, Fifth, and Eighth Circuits.

In affirming the District Court's dismissal in this case and in *Rivera*, the Fifth Circuit agreed with the Ninth Circuit's opinion in the case of *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) (denying injunctive relief). App. 1 and Apps. 8-10. The split has recently widened, extending to the courts of the Second Circuit, for the United States District Court for the Southern District of New York recently recognized that RICO authorizes injunctive and declaratory relief in *Motorola Credit Corp. v. Uzan*, 202 F. Supp.2d 239, 244 (S.D. N.Y. 2002). That same court also described the Ninth Circuit's *Wollersheim* doctrine as "far too wooden and narrow."

In this case and in its en banc affirmation of the District Court's dismissal in *Rivera*, Nolen submits that, with all due respect, the Fifth Circuit erred in concluding that injunctive relief was not available to him, especially in light of this Court's rulings that RICO should be enforced as written and liberally construed as the statute requires, in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985) (per curiam).

Accordingly, Nolen asks this Court to grant writ of certiorari and reverse the Fifth Circuit's decision as conflicting with this Court's precedent regarding the proper interpretation of the RICO statute.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S CIVIL RICO CLAIMS BECAUSE THE NUCENTRIX RESPONDENTS COLLECTED UNLAWFUL DEBTS IN VIOLATION OF RICO.

This case involves important issues about the interpretation of federal RICO law as it relates to the collection of unlawful debt. In this case, the Fifth Circuit relied upon unpublished Fifth Circuit precedent that misapplied Texas law to deny Nolen, and all other persons similarly situated, the right to seek redress under RICO for the damages suffered in this case.

Additionally, the Fifth Circuit's RICO analysis directly conflicts with other court of appeals' holdings on damages required to bring a RICO claim and the remedies available to RICO plaintiffs. Not only has the Fifth Circuit "entered a decision in conflict with the decision of another United States court of appeals" under SUP. CT. R. 10(a), but in light of this Court's recent opinions concerning RICO and other circuit courts' interpretations of RICO, the Fifth Circuit's analysis is outdated and erroneous. Accordingly, this Court should grant a writ of certiorari to correct the error below, resolve the conflict among the circuits and establish a uniform federal rule of decision for these recurring and important RICO issues, including the unresolved issue of what constitutes an unlawful debt actionable under the RICO statute.

The District Court erroneously interpreted Texas usury law thereby prematurely dismissing Nolen's claim

that Respondents collected an unlawful debt under RICO through usurious interest *charges*. In so holding, the Fifth Circuit relied solely on the companion *Rivera* case to conclude that fixed administrative late fees, such as the late fees charged by Respondents, were not usurious as a matter of law. *Id.* at 4.[1]

Under RICO, 18 U.S.C. § 1962(c), it is a crime for anyone to participate in the conduct of an enterprise that engages in collection of unlawful debt.[2] *See United States v. Oreto*, 37 F.3d 739, 751 (1st Cir. 1994). Pursuant to RICO, 18 U.S.C. § 1961(6), the term "unlawful debt" is defined as:

> [A] debt (A) incurred or collected in gambling activity which was in violation of the law of the United States, a State or political subdivision

---

[1] In *Rivera*, the District Court dismissed the plaintiffs' RICO claim because the "[t]he facts alleged . . . failed to show that Defendants have collected an unlawful debt because Plaintiffs have failed to plead usury under Texas law." 141 F.Supp.2d at 273. On March 25, 2002, the Fifth Circuit affirmed the *Rivera* dismissal, then re-affirmed it en banc a little more than a month later. *See Rivera v. AT&T Corp.*, No. 01-40953 (5th Cir. Mar. 25, 2002), *mot. rhg. en banc denied* (5th Cir. April 29, 2002). Apps. 9 & 10.

[2] 18 U.S.C. § 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

> thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6).

In this case, to properly plead a case based upon a collection of an unlawful debt, Nolen had to show that Nucentrix (1) was in the business of lending money or a thing of value; (2) collected a debt that was unenforceable under Texas usury laws; and (3) that the debt Nucentrix collected was at least twice the enforceable rate under Texas law. *Durante Bros. & Sons Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 248 (2d Cir. 1985). This requires this Court to briefly note Texas law on its way to the RICO issues raised in this appeal.

Nolen pled a proper RICO claim by alleging that Respondents collected unlawful debt through usurious interest *charges*. The Texas Credit Title provides that "[u]sury is contracting for, *charging*, or receiving interest in excess of a lawful amount." *See* TEX. REV. CIV. STAT. ANN. arts. 5069-101(d) and 1.06(1)-(2) (Vernon 1987), the predecessor to TEX. FINANCE CODE § 305.001 (Vernon Supp. 2001). The Texas Supreme Court has held that "[u]sury is contracting for, *charging*, or receiving interest

in excess of a lawful amount." *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997) (emphasis added).[3]

Further, the Texas Supreme Court has recognized that a monetary loan, a promissory note, and a disbursement of money is *not* a prerequisite to usury *charging* liability under TEXAS FINANCE CODE ANN. § 305.001 *et seq.* (Vernon Supp. 2001). *See, e.g., Windhorst v. Adcock Pipe Supply Co.*, 547 S.W.2d 260, 261 (Tex. 1977) ("[b]y describing the conditions precedent to recovery of [usury] penalties in the disjunctive, the Legislature made it clear that only one such condition need occur to trigger penalties; either a contract for, *a charge of* or a receipt of usurious interest."); *Steve's Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 474-476 (Tex. 1988) ("Invoices to Ceco indicated that

---

[3] This area of Texas law has long been confusing because the Credit Title contains several usury statutes prohibiting usury. Specifically, TEX. FINANCE CODE ANN. § 302.001(a) (Vernon's Supp. 2002), in subchapter A, states that a creditor may contract, charge, and receive from an obligor interest or time price differential. Further, TEX. FINANCE CODE ANN. § 302.001(b) (Vernon's Supp. 2002), specifies that the maximum rate is 10% per annum unless otherwise provided by law, and states that, "[a] greater rate of interest than 10% a year is usurious unless otherwise provided by law." Subsections (c) and (d) of TEX. FINANCE CODE ANN. § 302.001 expressly refer to "loans."

Moreover, TEX. FINANCE CODE § 305.001(a) *et seq.* (Vernon's Supp. 2001), provides an additional statute prohibiting usury, for it states that, "a creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor" for treble damages, $2,000.00 or 20 percent of the principal, whichever is less."

Case law interpreting one usury statute often does not apply in cases involving another usury statute. The unpublished decision in *Rivera* fails to address this important issue, and this leaves courts and counsel without guidance as to its proper resolution.

amounts not paid within thirty days would be subject to service charges, computed beginning thirty days after the invoice date."); *Preston Farm & Ranch Supply v. Bio-Zyme Enterprs.*, 625 S.W.2d 295, 298 (Tex. 1981) (same). As a matter of federal law, the Fifth Circuit decided similar "charging" cases in the same way in *ECE Technologies, Inc. v. Cherrington Corp.*, 168 F.3d 201, 205 (5th Cir. 1999) and *Engineering Tech. Analysts, Inc. v. Robray Offshore Drilling Co.*, 611 F.2d 540, 542-43 (5th Cir. 1980) (same).

In his Amended Complaint, Nolen alleged that his lawsuit concerned "the [Nucentrix's] loansharking through the collection of illegal and unenforceable fees from its customers in connection with its business of extending credit for the purchase of copyrighted television programs." App. 11, p. 87, ¶ 1. The Amended Complaint explained that Nucentrix sells its customers television programs, internet access, and voice telephony *on credit* so that the customer purchases the right to watch and/or record programs. *Id.* Nolen further alleged that the credit gave rise to a usurious relationship involving a forbearance of debt and detention of money. *Id.*, pp. 88-89. Nolen explained that "[e]ach late fee is a debt which is unenforceable un[der] State or Federal law, in whole or in part, as to principal or interest because of laws relating to usury where the usurious rate is at least twice the enforceable rate; and which was incurred in connection with the business of lending money or a thing of value at a rate usurious under State or Federal law." *Id.*, p. 90, ¶ 13.

In *Catalina v. Blasdel*, 881 S.W.2d 295 (Tex. 1994), the Texas Supreme Court considered the *contracting* usury test for whether a transaction involves a usurious loan. *Catalina*, 881 S.W.2d at 295, 297. The issue on appeal was whether any evidence supported the trial court's no-loan

finding, because "Blasdel cannot prevail if there is any evidence inconsistent with or contrary to his factual contention that the transaction was, in fact, a loan disguised as a device to evade the usury laws." *Id.* The Texas Supreme Court held "[t]here is ample evidence supporting the . . . conclusion that the transaction was not usurious [because] repayment of the amount advanced was contingent upon sale of the automobiles." *Id.* The most important aspect of *Blasdel* is the court's observation that

> While we held in *Holly v. Watts*, that an absolute obligation to repay was recognized as a statutory element under the usury provision there at issue, *we do not reach here the issue whether the legislature may provide or in deed has provided for usury penalties under other statutory provisions which do not require an absolute obligation to repay.*

Blasdel, 881 S.W.2d at 297 n.3 (emphasis added).

The Texas Supreme Court's *Blasdel* decision reflects that the critical issue regarding the nature of unlawful debt sufficient to serve as a predicate for a civil RICO claim has not been resolved. In this case, the Fifth Circuit erred in summarily concluding, as a matter of law, that the facts in this case could not give rise to civil RICO liability for charging illegal interest on unlawful debt. The issue remains open to this day because the Fifth Circuit has chosen not to address it in this case, but has instead chosen to rely on an unpublished, summary decision that reflects that court's recent reluctance to write and rule on the matter. As the Fifth Circuit observed in this case, "[i]n *Rivera*, the district court concluded that fixed administrative late fees, such as the ones at issue here, were not usurious as a matter of law. . . . We summarily affirmed the district court's decision. *Rivera v. AT & T Corp.*, No.

01-40953 (5th Cir. Mar. 25, 2002) (unpublished). Our decision in *Rivera* is controlling here." App. 1, p. 4.

Nolen submits that the issue is important nationwide because it is unresolved. Nolen also submits that the Fifth Circuit's wooden application of *stare decisis* principles to unpublished, summary analyses (1) ignores the previous Fifth Circuit ***charging***-usury cases cited above, *e.g., ECE Technologies, Inc. v. Cherrington Corp.,* 168 F.3d 201, 205 (5th Cir. 1999) and *Engineering Tech. Analysts, Inc. v. Robray Offshore Drilling Co.,* 611 F.2d 540, 542-43 (5th Cir. 1980); and (2) disregards the fact that Texas courts have limited the conventional requirement of a monetary "loan" to Texas Finance Code § 302.001 ***contracting***-usury claims, and not to § 305.001 ***charging***-usury claims. *See Colleen A. Coyne, "Banking Law,"* 48 SMU L. REV. 781 810-811 (May-June 1995) (citing *Blasdel*, 881 S.W.2d at 297, n.3).

Rather than leaping to dismiss Nolen's claims under Federal Rule of Civil Procedure 12(b)(6), the District Court and the Fifth Circuit should have permitted Nolen to conduct discovery and then conduct appropriate summary judgment proceedings. As the Texas Supreme Court ruled in *First U.S.A. Mgmt.,* "[w]hether an amount of money is interest depends not on what the parties call it but on the substance of the transaction." *Id.*, 960 S.W.2d at 627. Instead of permitting Nolen to develop his case, the District Court and the Fifth Circuit erroneously nipped it in the bud, terminating Nolen's ability to recover under the RICO statute.

II. THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S 18 U.S.C. § 1962(a) RICO CLAIM BECAUSE NOLEN SUFFERED COGNIZABLE USE-OF-RACKETEERING-INCOME DAMAGES.

The Court below further erred when it ruled that, as a matter of law, Nolen suffered no cognizable injury under 18 U.S.C. § 1962(a) because Nolen's claim did not *"flow from the use or investment of racketeering income."* *See* App. 1, p. 5, *citing Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992); and *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

A RICO plaintiff need not show that damages flowed from the use or investment of racketeering income, only that the damages flowed from the racketeering injury itself. While a majority of appellate courts have adhered to an artificial, investment-injury standing requirement for a RICO unlawful debt collection claim, these courts' precedent should be reconsidered, clarified, and rejected in light of this Court's recent decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (*"King"*), and the Fourth Circuit's decisions in *Busby v. Crown Central Supply,* 896 F.2d 833 (4th Cir. 1990) (*en banc*); and *Potomac Elec. Power Co. v. Electric Motor & Supply Co.,* 262 F.3d 260 (4th Cir. 2001), *cert. denied,* 122 S.Ct. 1297 (U.S. 2002). Other courts have rejected the investment-injury rule, including, *Avirgan v. Hull*, 691 F. Supp. 1357, 1362 (S.D. Fla. 1988), *aff'd,* 1932 F.2d 1572 (11th Cir. 1991); *Goold Electronics Corp. v. Galaxy Electronics, Inc.*, 1993 U.S. Dist. LEXIS 15009, 1993 WL 427727 (N.D. Ill. 1993); *Blue Cross of W. Penn. v. Nardone*, 680 F. Supp. 195, 198

(W.D. Pa. 1988); and *Omega Constr. Co. v. Altman*, 667 F. Supp. 453, 462-65 (W.D. Mich. 1987). These Fourth Circuit, Eleventh Circuit and District Court decisions are consistent with RICO as construed in this Court's *King* decision.[4] This Court needs to resolve this issue that has bedeviled and divided this nation's appellate courts.

There are three sound reasons for abandoning the Fifth Circuit's *Mercury* and *Parker & Parsley* investment-injury rule that artificially restricts the rights of RICO civil plaintiffs. First, the rule violates the Supreme Court's teaching in *King* that RICO must be construed *as written*. *See King*, 533 U.S. 158 (2001), *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (same); and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985) (*per curiam*) (same). The rule renders 18 U.S.C. § 1962(a)'s statutory term "use" and "operation" surplusage, effectively reading them out of the statute. This violates the anti-surplusage rule requiring those who interpret a statute to give meaning to every term and intendment of a statute. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous . . . ").

Second, enforcement of the statute as written achieves RICO's basic purpose of protecting the public

> from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a

---

[4] The Fifth Circuit's analysis of § 1962(a), as applied in *Mercury* and in *Parker & Parsley*, does not properly apply to a RICO claim based upon lawful debt as opposed to a "pattern of racketeering."

> 'vehicle' through which 'unlawful . . . activity is committed,' *National Org. for Women, Inc.* [*v. Scheidler*], 510 U.S. [249] at 259 [(1990)]. . . . That [RICO legislative] history not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.' S. Rep. No. 91-617, at 82.

King, 533 U.S. 158, 160.

Third, enforcement of the statute as written enables aggrieved plaintiffs to act as private attorneys-general by suing those who profit from their use of illegal proceeds obtained by charging consumers unlawful debts. "[T]he Supreme Court has consistently rejected interpretations by the courts of appeal that would limit the scope of RICO actions in ways not contemplated by the text of the statute." *National Org. for Women,* 267 F.3d at 698, *citing King*. "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general' dedicated to eliminating racketeering activity." *Id.*, *citing Rotella v. Wood*, 528 U.S. 529, 557 (2000).

The Fifth Circuit's evisceration of RICO's § 1962(a) in this case dilutes the logic of this Court's *King* and *Sedima* decisions, abandons the public policy behind the RICO statute, and widens the gap among the circuit courts on this issue. With all due respect, the Fifth Circuit sought to duck these important statutory issues by ignoring them in both this case and in its *Rivera* decisions. App. 1 and 9-10.

III. THE FIFTH CIRCUIT ERRED IN A MANNER HARMFUL TO NATIONAL JURISPRUDENCE BY AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF NOLEN'S 18 U.S.C. §§ 1964(a) AND 1964(c) CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE THOSE ARE COGNIZABLE CIVIL RICO CLAIMS.

Finally, the Court below erred in dismissing Nolen's RICO claim for injunctive and declaratory relief pursuant to 18 U.S.C. § 1964(a). Again here, as in the past, the Fifth Circuit has long refused to recognize RICO claims for injunctive relief. *See, e.g., Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 605 n.5 (5th Cir. 1998) (*citing Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) and *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) to hold that no injunctive relief is available); and *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988). In April of this year, this Court granted certiorari in *National Org. for Women* to resolve the deep divide between the Seventh Circuit and Ninth Circuit concerning the issue of whether injunctive relief is available to a private plaintiff bringing a civil cause of action under RICO. The Fifth Circuit's decision creates additional confusion and uncertainty as to the proper rule of decision in applying RICO in suits brought by private parties.

The Southern District of New York recently recognized the split in the case of *Motorola Credit Corp. v. Uzan*, 202 F. Supp.2d 239, 244 (S.D. N.Y. 2002). In *Motorola*, the plaintiffs were companies involved in the sale of cellular telephone equipment and alleged that the defendants, through a pattern of fraud, extortion, and other unlawful

activities, were defrauding them of more than $2.7 billion lent to a Turkish company. *Id.* at 242-43. The plaintiffs sought damages and extensive preliminary injunctive relief to prevent them from further diverting and depleting such assets as might be available to repay the $2.7 billion, including the attachment of various New York properties and the deposit in the registry of the court of certain shares pledged as collateral for the loans. *Id.* The Southern District of New York, noting that it would "gladly avoid the issue" until this Court ruled in *National Org. for Women*, reluctantly held that injunctive relief was available to plaintiffs bringing a civil action under RICO, 18 U.S.C. § 1961 *et seq.* *Id.* at 243.

In so holding, the Southern District of New York recognized the split between the Seventh and Ninth Circuit on the issue and ultimately sided with the Seventh Circuit. *Id.* at 243, *citing Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) (denying injunctive relief) and *National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (granting injunctive relief). The court explained:

> In concluding that injunctive relief was not available to private RICO plaintiffs, the Ninth Circuit in *Wollersheim* relied heavily on extended inferences drawn from what the Seventh Circuit in *Scheidler* described as mere "snipplets of legislative history." In reaching the opposite result, the Seventh Circuit relied on what it characterized as the "unambiguous statutory language" of the applicable section of RICO, § 1964. The present Court agrees with the result in *Scheidler*, but for somewhat different reasons. . . .
>
> Whether or not the language of § 1964 expressly confers this power as "unambiguously" as the

> Seventh Circuit asserts, it nowhere expressly denies courts this power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails. Furthermore, the Ninth Circuit's reading in *Wollersheim* of RICO's legislative history is far too narrow and wooden. RICO was originally conceived as a statute that would provide the Government, alone, with both criminal and civil remedies, with the former set forth in what became § 1963 and the latter in what became subsections (a) and (b) of § 1964. *See Sedima, S.P.R.L. v. Imrex Company, Inc.* 473 U.S. 479, 487, 87 L. Ed. 2d 346, 105 S.Ct. 3275 (1985). . . .
>
> Taken overall, then, what clearly emerges from the legislative history is that Congress intended to give private litigants the right to sue under RICO and that, since the Act nowhere else specified damages, this was expressly included in the amendment. But to go further and to suggest that Congress in so amending § 1964 to add a private right of action for damages thereby intended to deprive the district courts of applying to private civil RICO cases the courts' equitable powers and jurisdiction that subsection (a) of the Act so broadly affirmed is to push the legislative history far beyond what it can reasonably support.

Motorola, 202 F. Supp.2d at 243-44.

Likewise, the Fifth Circuit precedent on this issue, which relies heavily on the Ninth Circuit's Opinion in *Wollersheim*, is an unduly restrictive interpretation of RICO's legislative history, rather than the plain English, liberal-construction interpretation that this Court

mandated by this Court in *United States v. Turkette*, 452 U.S. 576 (1981), *Sedima*, and *King* decisions. That is why the Seventh Circuit properly concluded that,

> As an initial matter, we note that *Wollersheim* decision apparently misreads § 1964(b) when it states that 1964(b) explicitly 'permits the *government* to bring actions for equitable relief.' Section 1964(b) does not allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes not from anything in § 1964(b). . . .
>
> Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of the district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

National Org. for Women, 267 F.3d at 695-99.

Again, there are three sound reasons that this Court should grant certiorari and reject the Fifth Circuit's unduly restrictive reading of RICO – a crabbed interpretation that denies civil plaintiffs the right to obtain declaratory or injunctive relief necessary to achieve the statute's remedial ends. First, the rule violates this Court's teaching in *King* that RICO must be construed *as written*. *See King*, *Sedima,* and *American Nat'l Bank*.

Second, the Seventh Circuit's enforcement of the statute as written achieves RICO's purpose of protecting the public "from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.' *National Org. for Women, Inc.* [v. *Scheidler*], 510 U.S. [249] at 259 [(1990)] . . . . That [RICO legislative] history not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run 'organizations in a manner detrimental to the public interest.' S. Rep. No. 91-617, at 82." *King*, 533 U.S. 158, 160.

Third, enforcement of the statute as written enables aggrieved plaintiffs to enjoin wrongful activities – here, the repeated collection of unlawful debt – and obtain declarations that certain actions violate the law. As the Seventh Circuit recognized, "[the Supreme] Court has consistently rejected interpretations by the courts of appeal that would limit the scope of RICO actions in ways not contemplated by the text of the statute." *National Org. for Women*, 267 F.3d at 698, citing this Court's decision in *King*. "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general' dedicated to eliminating racketeering activity." *Id.*, 267 F.3d at 698, *citing Rotella v. Wood*, 528 U.S. 549, 557 (2000).

The Fifth Circuit chose to ignore the *en banc* Seventh Circuit's authoritative, post-Supreme Court analysis as well as the Eighth Circuit's precedent in *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on rhg.*, 710 F.2d 1362, 1366 (8th Cir. 1983) (en banc) (McMillan, J., Concurring), *cert. denied*, 464 U.S. 1008 (1983) (injunctive relief

possibly available under RICO). The split among the circuits is important, for the Seventh and Eighth Circuit's analyses are squarely at odds with the Ninth Circuit's *Wollersheim* analysis and the Fifth Circuit's decisions in this case, in *Rivera*, in *Price*, in *Fredeman*, and in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000).

"RICO's liberal construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section 'RICO's remedial purposes are most evident.'" *National Org. for Women*, 267 F.3d at 698, *citing Sedima*, 473 U.S. at 491 n.10. *See also Bennett v. Berg*, 710 F.2d 1362, 1366 (7th Cir. 1983) (McMillan, J., Concurring). *See also Motorola*, 202 F. Supp.2d at 244. Petitioner Nolen therefore submits that the Fifth Circuit has consistently restricted the scope of civil RICO in violation of this Court's teaching, and that the widening divide among the circuits requires a grant of certiorari.

CONCLUSION

THEREFORE, Petitioners John Nolen, individually and on behalf of all persons similarly situated, request of this Court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BRYAN POWERS
BRYAN POWERS, P.C.
P.O. Box 260968
Corpus Christi, TX 78426
(361) 767-9970
(361) 767-9971

DAVID A. FURLOW
Counsel of Record
KELLYE R. KOEHN
THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3100
Houston, TX 77007-4499
(713) 654-8111
(832) 397-8253

Attorneys for Petitioner John Nolen

APPENDIX 1

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 01-40808

JOHN NOLEN, Individually and on behalf of all persons similarly situated,

Plaintiff-Appellants,

versus

NUCENTRIX BROADBAND NETWORKS INC, also known as Heartland Wireless Communications, Inc., Et Al,

Defendants,

NUCENTRIX BROADBAND NETWORKS INC, also known as Heartland Wireless Communications, Inc; NUCENTRIX TELECOM; HEARTLAND CABLE TELEVISION; NUCENTRIX BROADBAND NETWORKS; NUCENTRIX INTERNET SERVICES; NUCENTRIX SPECTRUM; NUCENTRIX TELEPHONY; CYBERWAVE HEARTNET; CLEAR CHOICE TV; NUCENTRIX INTERNET SERVICES INC; HEARTLAND CABLE TELEVISION INC; SPECTRUM RESOURCES INC; WIRELESS ONE INC; CS WIRELESS SYSTEMS INC; CAI WIRELESS SYSTEMS INC; UNIDENTIFIED PARTIES, 1-34; STEPHEN FEINBURG; CERBERUS PARTNERS LP; CERBERUS INTERNATIONAL LTD; CERBERUS INSTITUTIONAL PARTNERS LP, its joint ventures and alliance members; DIRECTV INC; HUGHES ELECTRONICS CORPORATION; CROSS COUNTRY WIRELESS INC; RURAL VISION JOINT VENTURA; its officers and directors; CARROLL D MCHENRY; MARJEAN HENDERSON; AMY E IVANOFF; RICHARD B GOLD; TERRY S PARKER; NEIL S SUBIN; R TED WESCHLER; ROBERT S CECIL; JACK R CROSLY;

J R HOLLAND, JR; JOHN A SPRAGUE; L ALLEN WHEELER; ISP ALLIANCE INC; WIRELESS ENTERPRISES LLC; PEOPLES CHOICE TV CORP,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Jun. 26, 2002)

Before DAVIS, EMILIO M. GARZA, and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiff-Appellant John Nolen filed this lawsuit on behalf of a class of similarly situated cable subscribers against Nucentrix Broadband Networks, Inc., various other related corporations, subsidiaries, and individual directors named in Nolen's notice of appeal (collectively, "Nucentrix") for violations of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. § 1961 et seq. Specifically, Nolen alleged that Nucentrix collected unlawful debts in the form of late fees from cable subscribers in violation of 18 U.S.C. §§ 1962(a), (c), and (d).

Nucentrix filed a motion to dismiss Nolen's suit. While that motion was pending, the district court dismissed a factually identical suit brought by the same attorneys representing Nolen on behalf of a separate class of plaintiffs. *See Rivera v. AT&T Corp.,* 141 F. Supp. 2d 719 (S.D. Tex. 2001). Based on its decision in *Rivera,* the district court then dismissed Nolen's claims for failure to state a claim upon which relief could be granted. *See* FED. R. CIV.

P. 12(b)(6). The trial court concluded that Nolen merely recharacterized the same facts the court had addressed and dismissed in *Rivera* so as to match the language of the relevant RICO provisions. Nolen now appeals the district court's decision.

Nucentrix provides cable services to their customers pursuant to an agreement in which the subscribers agree to pay a monthly fee for the use of cable equipment as well as cable programming content. Depending on the particular mix of equipment and programing purchased, an average customer's bill can range from $16.70 to $141.90. The agreement further provides that customers must pay an "administrative fee" between $3.00 and $5.00 if they are delinquent in making one of their monthly payments. Thus, the additional "late fee" could constitute up to thirty percent of the amount actually due at the end of a month. Nolen claims that these fees are usurious under Texas law and, therefore, Nucentrix is engaged in the business of collecting unlawful debts in violation of 18 U.S.C. § 1962(c). Nolen further claims that he has been injured by reason of Nucentrix's use and investment of income from their collection of these unlawful debts in violation of 18 U.S.C. § 1962(a). In addition, he alleges that Nucentrix conspired to collect an unlawful debt in violation of 18 U.S.C. § 1962(d).[1]

---

[1] Nolen also argues that Nucentrix was unjustly enriched through its collection of late fees. Nolen seeks restitution of the late fees Nucentrix collected on the theory that Nucentrix violated the Texas usury statute. TEX FIN. CODE § 305.007 provides, however, that "[t]he penalties provided by the [usury chapter] are the only penalties for violation of this subtitle for contracting for, charging, or receiving interest in an amount that produces a rate in excess of the maximum

(Continued on following page)

This appeal arises from the district court's dismissal of Nolen's claims pursuant to FED. R. CIV. P. 12(b)(6). We evaluate the district court's grant of Nucentrix's Rule 12(b)(6) motion *de novo,* applying the same standard used by the district court. In doing so, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs. *See Rubinstein v. Collins,* 20 F.3d 160, 166 (5th Cir. 1994). Nevertheless, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993).

Nolen first alleges that Nucentrix collected an "unlawful debt" in violation of 18 U.S.C. § 1962(c).[2] 18 U.S.C. § 1961(6) defines the term "unlawful debt" as:

> [A] debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or

---

rate allowed by law. *Common law penalties do not apply.*" TEX FIN. CODE § 305.007 (emphasis added). Thus, the district court properly dismissed Nolen's unjust enrichment claim because restitution for unjust enrichment is a common law penalty, expressly prohibited by the Texas Finance Code.

[2] Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

> interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6). Nolen does not allege that Nucentrix was engaged in any gambling activities. Thus, in order for Nolen to establish that Nucentrix collected an "unlawful debt," he must demonstrate that Nucentrix (1) was in the business of lending money or a thing of value; (2) collected a debt that was unenforceable under Texas usury laws; and (3) that the debt Nucentrix collected was at least twice the enforceable rate under Texas law. *See Durante Bros. & Sons Inc. v. Flushing Nat'l Bank,* 755 F.2d 239, 248 (2d Cir. 1985) (setting out the elements of a cause of action under § 1962(c)).

In *Rivera,* the district court concluded that fixed administrative late fees, such as the ones at issue here, were not usurious as a matter of law. *Rivera,* 141 F. Supp. 2d at 723-24. We summarily affirmed the district court's decision. *Rivera v. AT&T Corp.,* No. 01-40953 (5th Cir. Mar. 25, 2002) (unpublished). Our decision in *Rivera* is controlling here. A fixed administrative or late fee charged under a rental or service agreement is not regarded as interest under Texas law. *Rivera,* 141 F. Supp. 2d at 724 (holding that "late fees charged are not construed as 'interest' under Texas law"). Thus, Nolen has failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt." The district court correctly relied on its decision in *Rivera* in dismissing Nolen's § 1962(c) claim.

Nolen next challenges the district court's ruling that, as a matter of law, he suffered no cognizable injury under 18 U.S.C. § 1962(a).[3] Here, Nolen is asserting a civil RICO claim. Thus, § 1962(a) must be read in conjunction with 18 U.S.C. § 1964(c), which creates a civil cause of action for damages resulting from violations of § 1962. 18 U.S.C. § 1964(c) states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains." We have consistently held that the causal language of § 1964(c) requires that the compensable injury stem directly from the violation of the RICO section in question. *See, e.g., Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992) (holding that there must be a nexus between the claimed violation and the plaintiff's injury); *Crowe v. Henry,* 43 F.3d 198, 205 (5th Cir. 1995) (same). For claims arising under § 1962(a), alleging an injury solely from the predicate racketeering acts themselves is not sufficient because § 1962(a) does not prohibit those acts. *Parker & Parsley,* 972 F.2d at 584. Instead, "any injury must flow

---

[3] 18 U.S.C. § 1962(a) provides, in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a).

from *the use or investment of racketeering income.*" *St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 441 (5th Cir. 2000) (emphasis added). Here, Nolen's alleged injury stems solely from Nucentrix's assessment and collection of late fees, not from Nucentrix's use or investment of those fees. As such, Nolen has failed to assert a valid claim under § 1962(a). *Parker & Parsley,* 972 F.2d at 584.

Nolen also asserts a claim under 18 U.S.C. § 1962(d), which prohibits conspiring to violate §§ 1962(a) and (c).[4] The "failure to plead the requisite elements of either a § 1962(a) or a § 1962(c) violation implicitly means that [Nolen] cannot plead a conspiracy to violate either section." *Simon v. Value Behavioral Health, Inc.,* 208 F.3d 1073, 1084 (9th Cir. 2000). Thus, the district court also correctly dismissed Nolen's conspiracy claims.

For the foregoing reasons, we AFFIRM the district court's dismissal of Nolen's claims.

---

[4] 18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JOHN NOLEN, individually and on behalf of all persons similarly situated,	§	
Plaintiff,	§	Civil Action
v.	§	No. V-00-134
NUCENTRIX BROADBAND NETWORKS INC, a/k/a Heartland Wireless Communications Inc; NUCENTRIX TELECOM; HEARTLAND CABLE TELEVISION; NUCENTRIX BROADBAND NETWORKS; NUCENTRIX INTERNET SERVICES; NUCENTRIX SPECTRUM; NUCENTRIX TELEPHONY; CYBER WAVE HEARTNET; CLEAR CHOICE TV; NUCENTRIX INTERNET SERVICES INC; HEARTLAND CABLE TELEVISION INC; NUCENTRIX SPECTRUM RESOURCES INC; WIRELESS ONE INC; CS WIRELESS SYSTEMS INC; CAI WIRELESS SYSTEMS INC; UNIDENTIFIED PARTIES 1-34; STEPHEN FEINBURG; CERBERUS PARTNERS LP; CERBERUS INT'L LTD; CERBERUS INSTITUTIONAL PARTNERS LP, its joint ventures and alliance members; DIRECTV INC; HUGHES ELECTRONICS CORP; GM CORP; CISCO SYSTEMS INC; CROSS COUNTY WIRELESS INC; RURAL	§	

VISION JOINT VENTURE, its officers and directors; CARROLL D. MCHENRY; MARJEAN HENDERSON; AMY E. IVANOFF; RICHARD B. GOLD; TERRY S. PARKER; NEIL S. SUBIN; R. TED WESCHLER; ROBERT S. CECIL; JACK R. CROSLY; J. R. HOLLAND, JR.; JOHN A. SPRAGUE; L. ALLEN WHEELER; ISP ALLIANCE INC; SBA TOWERS INC; WIRELESS ENTERPRISES LLC; PEOPLE'S CHOICE TV CORP,	§
Defendants.	§

ORDER

(Filed Jun. 29, 2001)

Before the Court is Plaintiffs' Motion to Alter or Amend the Order of Dismissal entered on June 14, 2001. Because Plaintiff has failed to demonstrate that the Court committed clear legal error, the Motion is DENIED.

IT IS SO ORDERED.

SIGNED this 29 day of June, 2001.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

To insure full notice, each party who receives this notice shall forward a copy of it to every other party and affected non-party even though they may have been sent one by the Court.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JOHN NOLEN, individually and on behalf of all persons similarly situated,	§	
	§	
Plaintiff,	§	Civil Action
v.	§	No. V-00-134
	§	
NUCENTRIX BROADBAND NETWORKS INC, a/k/a Heartland Wireless Communications Inc; NUCENTRIX TELECOM; HEARTLAND CABLE TELEVISION; NUCENTRIX BROADBAND NETWORKS; NUCENTRIX INTERNET SERVICES; NUCENTRIX SPECTRUM; NUCENTRIX TELEPHONY; CYBERWAVE HEARTNET; CLEAR CHOICE TV; NUCENTRIX INTERNET SERVICES INC; HEARTLAND CABLE TELEVISION INC; NUCENTRIX SPECTRUM RESOURCES INC; WIRELESS ONE INC; CS WIRELESS SYSTEMS INC; CAI WIRELESS SYSTEMS INC; UNIDENTIFIED PARTIES 1-34; STEPHEN FEINBURG; CERBERUS PARTNERS LP; CERBERUS INT'L LTD; CERBERUS INSTITUTIONAL PARTNERS LP, its joint ventures and alliance members; DIRECTV INC; HUGHES ELECTRONICS CORP; GM CORP; CISCO SYSTEMS INC; CROSS COUNTY WIRELESS INC; RURAL VISION JOINT VENTURE, its officers	§	

and directors; CARROLL D. MCHENRY; MARJEAN HENDERSON; AMY E. IVANOFF; RICHARD B. GOLD; TERRY S. PARKER; NEIL S. SUBIN; R. TED WESCHLER; ROBERT S. CECIL; JACK R. CROSLY; J. R. HOLLAND, JR.; JOHN A. SPRAGUE; L. ALLEN WHEELER; ISP ALLIANCE INC; SBA TOWERS INC; WIRELESS ENTERPRISES LLC; PEOPLE'S CHOICE TV CORP,	§
Defendants.	§

ORDER OF DISMISSAL

(Filed Jun. 13, 2001)

Before the Court are Plaintiff's Motion to file a First Amended Complaint and Defendants' Motions to Dismiss Plaintiff's lawsuit under Federal Rule of Civil procedure 12(b)(6). Plaintiff's Motion to File a First Amended Complaint is hereby GRANTED.

Plaintiff's lawsuit is nearly identical to the suit brought before this Court in *Rivera v. AT&T Corporation,* 2001 WL 460290 (S.D. Tex.). While Plaintiff's Amended Complaint purports to change the factual allegations, the Court finds that it merely re-characterizes the facts to match the language of the Federal Racketeer Influenced and Corrupt Organizations Act. *See* Title 18 U.S.C. § 1962. While we are bound by the facts alleged by Plaintiff in his complaint, we are not bound by Plaintiff's legal characterization of those facts. *See Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993) (noting that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

Accordingly, for the reasons discussed in this Court's decision in *Rivera v. AT&T Corporation,* 2001 WL 460290 (S.D. Tex.), Defendant's Motions to Dismiss are hereby GRANTED. The lawsuit is hereby DISMISSED with prejudice and all other motions pending before the Court in this lawsuit are DENIED as moot.

IT IS SO ORDERED.

SIGNED this 13th day of June, 2001.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

To insure full notice, each party who receives this notice shall forward a copy of it to every other party and affected non-party even though they may have been sent one by the Court.

APPENDIX 4

Thomas A. RIVERA, Sonia de la Rosa, Robert P. McGuill, Ismael Espinosa, Maricela Garza, and Stephen Perez, for themselves and on behalf of all others similarly situated, Plaintiffs,

v.

AT & T CORPORATION, Time Warner, Inc., Tele-Communications, Inc., TCI Cablevision of Texas, Inc., Texas Cable Partners, LP, KBL Cablesystems of the Southwest, Inc., TCI Central, Inc., Time Warner Entertainment Company, LP, and TWI Cable, Inc., for themselves and as representatives of all others similarly situated, Defendants.

Civ.A. No. V-00-93.

United States District Court,
S.D. Texas,
Laredo Division.

April 17, 2001.

Bryan Powers, Attorney at Law, Robstown, TX, for Thomas A. Rivera, Sonia de la Rosa, Robert P. McGuill, Ismael Espinosa, Maricela Garza and Stephen Perez.

Bryan Powers, Attorney at Law, Robstown, TX, Harlin C. Womble, Jr., Attorney at Law, Corpus Christi, TX, for Antonio Martinez and John Braun.

Gregg Charles Laswell, Suzanne R. Chauvin, Akin Gump Hauer & Feld, Houston, TX, Richard Milvenan, Austin, TX, for defendants.

ORDER OF DISMISSAL

ELLISON, District Judge.

Before the Court are Defendants' Motions to Dismiss Plaintiffs' lawsuit under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, Defendant's Motions are hereby GRANTED and the lawsuit is DISMISSED with prejudice. All other motions pending before the Court in this lawsuit are hereby DENIED as moot.

I. Background

Plaintiffs Thomas A. Rivera, Sonia de la Rosa, Robert P. McGuill, Ismael Espinosa, Maricela Garza, and Stephen Perez have filed this lawsuit on behalf of a class of cable subscribers against a class of Defendants pursuant to the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). Title 18 U.S.C. §§ 1962(a), (c), and (d). The named Defendants are AT & T Corporation, Time Warner Incorporated, Tele-Communications Incorporated, TCI Cablevision of Texas Incorporated, Texas Cable Partners LP, KBL Cablesystems of the Southwest Incorporated, TCI Central Incorporated, TWI Cable Incorporated, and Time Warner Entertainment Company LP. All are cable systems operators who provide cable services to their subscribing customers in the Southern District of Texas and elsewhere.

Plaintiffs have defined the class of Defendants to include "all persons who charged a late fee to a cable service subscriber and who directly or through one or more subsidiar[ies] or affiliate[s] own a significant interest in a cable system," or who otherwise control or are responsible for a cable system identified by one of the Federal Communications Commission Community Unit Identification

Numbers listed in Plaintiffs' complaint, or a cable system operated by a division of Time Warner Cable in one of the cities listed in the complaint.[1]

These Defendants provide cable services to their customers pursuant to an agreement in which the subscribers agree to pay a monthly fee for the use of the cable equipment and the cable programming provided through that equipment. The agreement further provides that subscribers be charged a $3.00 or $5.00 "administrative fee" if their monthly payments are not received by the designated due date. The monthly payments owed by the named Plaintiffs ranged from $16.79 to $141.90 and, thus, the additional "administrative fees" constituted up to 30% of the original amount due.[2] Plaintiffs allege that these

---

[1] Plaintiffs list the following cities: Austin, Texas; Orlando, Florida; Bakersfield, California; Green Bay, Wisconsin; Raleigh/Durham, North Carolina; Birmingham, Alabama; Greensboro, North Carolina; Reading, Pennsylvania; Boston, Massachusetts; Honolulu, Hawaii; Rochester, New York; Charlotte, North Carolina; Memphis, Tennessee; San Diego, California; Cincinnati, Ohio; New York City, New York; Shreveport, Louisiana; San Antonio, Texas; Houston, Texas; Indianapolis, Indiana; Kansas City, Missouri; Minneapolis, Minnesota; Milwaukee, Wisconsin; Portland, Oregon; Los Angeles, California; Tampa, Florida; Syracuse, New York; Albany, New York; and Portland, Maine.

[2] Plaintiffs Thomas Rivera and Sonia de la Rosa allege that Texas Cable Partners LP, doing business as Time Warner Communications, charged them a $5.00 late fee for failing to pay their bill of $141.90 until 51 days after it was due. Robert McGuill alleges that TCI Cablevision of Texas, Inc. charged him a $3.00 late fee for failing to pay his bill of $60.38 until 48 days after it was due. Ismael Espinosa alleges that TCI Cablevision of Texas, Inc. charged him a $3.00 late fee for failing to pay his bill of $32.66 until 33 days after it was due. Maricela Garza alleges that Texas Cable Partners LP, doing business as Time Warner Communications, charged her a $5.00 late fee for failing to pay her bill of $16.79 until 22 days after it was due. Stephen Perez alleges that KBL Cablesystems of the Southwest, doing business as Paragon Cable,

(Continued on following page)

fees are usurious under Texas law and that, by collecting these fees, Defendants have violated the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). Title 18 U.S.C. §§ 1962(a), (c), (d). Plaintiffs claim they are entitled to recover damages, litigation costs, and reasonable attorney's fees pursuant to Title 18 United States Code, section 1964(c) (providing a private cause of action to individuals injured by RICO violations).

II. Discussion

Defendants Time Warner, Inc., Texas Cable Partners, L.P., KBL Cablesystems of the Southwest, Inc., Time Warner Entertainment Company, L.P., TWI Cable, Inc., AT & T Corporation, Tele-Communications, Inc., TCI Cablevision of Texas, Inc., and TCI Central, Inc. have moved to dismiss Plaintiffs' lawsuit for failure to state claim on which relief can be granted. Fed.R.Civ.P. 12(b)(6). In their Motions, Defendants "admit[ ] the facts alleged in the complaint, but challeng[e] plaintiff[s'] right to relief based upon those facts." *Ward v. Hudnell,* 366 F.2d 247, 249 (5th Cir.1966). Thus, the Court cannot grant Defendants' Motions to Dismiss unless Plaintiffs would not be entitled to recover under any set of facts that could be proven consistent with the allegations in the complaint. *See Bonner v. Henderson,* 147 F.3d 457, 459 (5th Cir.1998).[3]

---

charged him a $5.00 late fee for failing to pay his $59.84 bill until 34 days after it was due.

[3] Defendants additionally claim that this suit should be dismissed pursuant to a settlement agreement entered into by all of the named Plaintiffs in this case as well as Defendants. The parties disagree, however, as to the effective date of the agreement. *See Owens et. al. v.*

(Continued on following page)

Congress enacted RICO as part of an effort to "reduc[e] the insidious capabilities of persons in organized crime to infiltrate the American economy." *United States v. Frumento,* 563 F.2d 1083, 1090 (3rd Cir.1977). In order for Plaintiffs to recover damages for violations of Title 18 U.S.C. § 1962(a), (c), or (d), they must show that Defendants are 1) persons who have engaged in, 2) the collection

---

TCI Cablevision of Dallas, Inc., et al., No. E-157-770 (172nd D.Texas Oct. 5, 2000). Defendants claim that the effective date of the settlement agreement has been set at February 16, 2001 while Plaintiffs assert the settlement's effective date is contingent on the terms set out in the agreement. Because of the disagreement, the Court does not choose to dismiss the lawsuit on this ground. We would, however, like to note our concern with the manner in which Plaintiffs' counsel appears to have handled the execution of the agreement.

As this Court reads the settlement terms, the agreement was to be effective when, by joint motion of the parties involved, all lawsuits subject to the agreement, including three of the lawsuits brought by Plaintiffs' counsel, were dismissed *with prejudice* in their respective courts. When Defense counsel moved this Court to dismiss Plaintiff's case on the grounds of res judicata, this Court discovered that these terms had not been met. We received a letter from Plaintiffs' counsel in which he admits that he moved two courts to dismiss *without prejudice* his other two pending lawsuits against Defendants. Plaintiffs' counsel argued that, because the requirements for the effective date had not been and would not ever be met, the settlement agreement could not act as res judicata against the present lawsuit. On this ground, Plaintiffs' counsel urged the Court to deny Defendants' Motions to Dismiss. While the Court recognizes that Plaintiffs' counsel did not represent the plaintiff class in that settlement, the agreement was made with the expectation that the parties to that settlement, including some of the named Plaintiffs in this case, would make a good faith effort to comply with those terms. *Cf. Herbage v. Snoddy,* 864 S.W.2d 695, 699 (Tex.App. – Houston 1993) (noting that a buyer does not breach a contract for sale if he "make[s] good faith efforts to obtain the loan under the contract conditions, but [is] unable to do so"). The Court finds troubling the apparent attempts by Plaintiffs' counsel to evade his clients' obligations in this manner.

of an unlawful debt, 3) in connection with the acquisition, establishment, conduct, or control of an enterprise. *See Delta Truck & Tractor, Inc., v. J.I. Case Company,* 855 F.2d 241, 242 (5th Cir.1988). Because Plaintiffs have failed to offer any allegations supporting either the notion that Defendants collected an unlawful debt or that an enterprise existed, Plaintiffs cannot recover any RICO damages.

A. Defendants have not collected an unlawful debt

A RICO person "includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). While Plaintiffs assert their claim against an entire class of defendants, each member of the class is defined as a legal entity meeting the qualifications of a RICO person. Thus, this Court finds that Plaintiffs have adequately pled the "person" element of their RICO claim.

Plaintiffs, however, have failed adequately to plead that Defendants have engaged in the "collection of an unlawful debt." Title 18 United States Code, section 1961(6) defines an "unlawful debt" as one:

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, *or which is unenforceable under State of* [sic] *Federal law in whole or in part as to principle or interest because of the laws relating to usury,* and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, *or the business of lending money or thing of value at a rate usurious under State or Federal*

> *law, where the usurious rate is at least twice the enforceable rate.* (emphasis added)

Because Plaintiffs allege no gambling activity by Defendants, they must allege facts to show that Defendants have a) collected a debt unenforceable under state or federal law, and b) which was incurred in connection with the business of lending where the usurious rate was twice that which would have been enforceable.

Plaintiffs claim they have alleged facts to meet both of these requirements. Plaintiffs assert that the $3.00 and $5.00 "administrative fees" Defendants charge customers for the late payment of their monthly bills are unenforceable under Texas usury law. Because Texas usury law forbids interest charges in excess of 10% of the principal due each year, Plaintiffs argue that the "administrative fees" constituting up to 30% of the principal due are more than twice the usurious rate. The facts alleged by Plaintiffs, however, fail to show that Defendants have collected an unlawful debt because Plaintiffs have failed to plead usury under Texas law.

Texas usury law prohibits the charging of "interest" in excess of 10% per year. *See* Tex.Fin.Code § 302.001; *Rimco Enterprises, Inc. v. Texas Electric Service Company,* 599 S.W.2d 362, 366 (Tex.Civ.App. – Fort Worth 1980) (asserting that "there must be 'interest' or there can be no usurious interest"). "Interest" is defined under the Texas Finance Code as "compensation for the use, forbearance, or detention of money." *See* Tex.Fin.Code § 301.002(4); *Crow v. Home Savings Association of Dallas County,* 522 S.W.2d 457, 459 (Tex.1975) (asserting that "[i]t is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money; if neither of

these elements exist, there can be no usury"). Plaintiffs have not alleged that Defendants charged any "interest" because they have not alleged that Defendants received any compensation for the use, forbearance, or detention of money.

Plaintiffs have attempted to show a "lending relationship" between the cable providers and their subscribers by arguing that Defendants are in the business of lending cable equipment to their customers. They claim that the "administrative fees" Defendants charged for late payments, therefore, constitute usurious interest. The Court disagrees with this characterization and finds that Defendants are more accurately described as cable service providers and, as service providers, Defendants' late fees cannot be usurious. *See Rimco Enterprises, Inc. v. Texas Electric Service Company,* 599 S.W.2d 362, 366 (Tex.Civ.App. – Fort Worth 1980) (dismissing a defendant's counterclaim against electricity provider that its charge for late payment of electric bills was usurious because "interest is the compensation allowed by law fixed by the parties to a contract for the use, forbearance, or detention of money").

Even assuming, however, that Defendants' business could be accurately characterized as cable equipment lending, Plaintiffs have failed to plead any usury. A contract between parties to "lend" property is a rental agreement and the late fees charged are not construed as "interest" under Texas usury law. *See Apparel Manufacturing Company, Inc. v. Vantage Properties, Inc.,* 597 S.W.2d 447, 449 (Tex.Civ.App. – Dallas 1980) (holding that "a rental contract is not a 'lending transaction' and that the usury statutes cannot be applied to the 'late charge' contracted for by the parties"); *Potomac Leasing Company*

v. Housing Authority of the City of El Paso, 743 S.W.2d 712, 713 (Tex.App. – El Paso 1987) (asserting that "to establish usury [in lease transactions], it was necessary to first establish that the leases were not mere leases but were, instead, lease-purchase agreements").[4]

Finally, Plaintiffs argue that RICO does not require the pleading of adequate facts to support a Texas usury claim. Instead, they assert that they have referenced Texas usury law for the sole purpose of "defining" the usurious rate. Plaintiffs cite a line of cases which hold that

---

[4] Plaintiffs argue, alternatively, that case law that pre-dates the codification of Texas usury law is irrelevant to the analysis of what constitutes usury under the current statutory scheme. They, therefore, argue that the case law requiring the use, forbearance, or detention of money for usury to exist, is obsolete. This argument fails for two primary reasons. First, every, case that has interpreted the Texas usury statute, from its inception, has found that statute to require the use, forbearance, or detention of money for usury to exist. *See e.g., Schepps Grocery Company v. Burroughs Corporation,* 635 S.W.2d 606, 610 (Tex.App. – Houston 1982) (finding that "[i]t is a fundamental principle governing the law of usury that it must be founded on a loan of forbearance of money"); *First Bank v. Tony's Tortilla Factory,* 877 S.W.2d 285, 287 (Tex.1994) (asserting that "[i]nterest is compensation for the use, forbearance, or detention of money .... [and i]f there is no interest, there can be no basis for usury"); *Grotjohn Precise Connexiones International, S.A. v. JEM Financial, Inc.,* 12 S.W.3d 859, 875 (Tex.App. – Texarkana 2000) (finding that essential elements of usury to be "(1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the exaction from the borrower of a greater compensation than the amount allowed by law for the use of money by the borrower").

Second, even if this Court accepted Plaintiffs' proposition that each time a statute is amended, all prior case law must be disregarded, the 2001 version of the Texas usury statute explicitly defines the term "interest" as "compensation for the use, forbearance, and detention of money." Tex.Fin.Code § 301.002(4). The Texas statute further defines "usury" as "a greater rate of *interest* than 10 percent a year." Tex.Fin.Code § 302.001(b) (emphasis added).

"the conduct on which the federal charge is based [need only be] typical of the serious crime dealt with by the state statute, . . . the particular defendant [need not] be 'chargeable under State law' at the time of the federal indictment." *United States v. Frumento,* 563 F.2d 1083, 1087-88 (3rd Cir.1977). *See also United States v. Forsythe,* 560 F.2d 1127, 1135 (3rd Cir.1977) (asserting that "[t]o interpret state law offenses to have more than a definitional purpose [in RICO] would be contrary to the legislative intent of Congress"); *United States v. Salinas,* 564 F.2d 688, 690-91 (5th Cir.1977) (finding that courts need not look to "'the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the . . . activity charged'") (citing *United States v. Nardello,* 393 U.S. 286, 295, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969)).

Those decisions, however, are inapplicable to the present lawsuit because in each case the defendant was actually alleged to have violated state law. Thus, the reference to state law served the purpose of defining the predicate illegal act. *See United States v. Frumento,* 563 F.2d 1083, 1087-88 (3rd Cir.1977) (emphasizing that the purpose of RICO was not to punish the state law violations committed by the defendants, but to "punish[ ] the use of facilities in interstate commerce in furtherance of enterprises violative of state statutes"); *United States v. Forsythe,* 560 F.2d 1127, 1134-35 (3rd Cir.1977) (finding that, even though defendants could not be convicted in state court due to the state statute of limitations, the state law violations could still serve the basis for a federal RICO action because "RICO incorporates the elements of those state offenses for definitional purposes"); *United States v. Salinas,* 564 F.2d 688, 690 (5th Cir.1977) (holding that a

federal RICO claim on the basis of the illegal collection of gambling debts is cognizable, in a state that forbids gambling but does not specifically bar "the business of gambling" because "references to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute").

In the instant case, Plaintiffs do not use Texas law to define the predicate illegal act. Instead, they use Texas's 10% usurious rate to meet RICO's requirement of having "the usurious rate [be] twice the enforceable rate" while rejecting Texas's definition of usury itself. 18 U.S.C. § 1961(1)(B). Because Plaintiffs cannot allege that Defendants' behavior met the "definition" of usury under Texas law, they cannot claim that Defendants have committed a predicate illegal act sufficient to sustain a RICO claim.

Because Defendants' $3.00 and $5.00 "administrative fees" do not violate the Texas usury statute and Plaintiffs have not alleged a violation of any other state or federal law, Plaintiffs have failed to demonstrate those fees to be "unenforceable" under Title 18 United States Code, section 1961(6)(A). Therefore, Plaintiffs cannot allege that Defendants have "collected an unlawful debt" as required to state a claim under Title 18 United States Code, sections 1962(a), (c), and (d).

B. Defendants are not engaged in an "enterprise"

Even if Plaintiffs could prove Defendants engaged in the collection of an unlawful debt, they have failed to show that Defendants did so in connection with the acquisition, establishment, conduct, or control of an enterprise. Title 18 United States Code, section 1961(4) defines a RICO enterprise to include "any individual, partnership,

corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." Here, Plaintiffs have alleged that Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc. each constitutes an enterprise within the meaning of 18 U.S.C. § 1961(4).[5] Plaintiffs' general allegation of an enterprise wholly fails the strict pleading requirements under RICO. [6] *See Elliott v. Foufas,* 867 F.2d 877, 881 (5th Cir.1989) (asserting that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise"). Plaintiffs have alleged absolutely no specific facts to establish the existence of any RICO enterprise and the facts that have been alleged demonstrate that Defendants are not engaged in a RICO enterprise.

---

[5] The Court notes that Plaintiffs have not even alleged the participation of any other named Defendants or members of the Defendant class in any of these "enterprises." Accordingly, Plaintiffs' RICO claims against them must fail. *See Elliott v. Foufas,* 867 F.2d 877, 881 (5th Cir.1989) (asserting that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise").

[6] All that Plaintiffs have alleged is the following, which appears twice in their complaint:

> At all relevant times Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc., each constituted an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a). Each enterprise is an ongoing organization. Each enterprise has engaged in, and its activities have affected interstate and foreign commerce.

Plaintiff's Comp. at 18 and 20.

A RICO enterprise must be "an entity separate and apart from the pattern of activity in which it engages." *Atkinson v. Anadarko Bank & Trust, Co.*, 808 F.2d 438, 441 (5th Cir.1987). Plaintiffs have alleged no facts to suggest that Tele-Communications, Inc., AT & T Corporation, or Time Warner, Inc. exist as an entity apart from their business of providing cable services. *See id.* at 441 (dismissing the RICO claim because there was "no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank"). In fact, Plaintiffs' own allegations demonstrate that the allegedly usurious acts were committed as part of each corporation's cable business. *See Old Time Enterprises, Inc. v. International Coffee Corporation*, 862 F.2d 1213, 1217 (5th Cir.1989) (holding that when the defendant is a legal entity, the plaintiffs must do more than establish that the corporation, through its agents, committed the predicate acts in the conduct of its own business).

Construing Plaintiffs' complaint to allege that Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc., together constitute a RICO enterprise does not redeem the claim. Plaintiffs would need to demonstrate an "association in fact" which requires "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Atkinson v. Anadarko Bank & Trust, Co.*, 808 F.2d 438, 440-41 (5th Cir.1987) (quoting *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). Further, Plaintiffs would need to "plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts."

Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir.1989). Plaintiffs' allegations establish exactly the opposite: that any association between Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc. exists merely for the purposes of providing cable services in exchange for a monthly fee.

C. Plaintiffs have not suffered an injury under § 1962(a)

Plaintiffs have failed not only to establish a basic RICO claim, they have not alleged the injury required to sustain a cause of action under 18 U.S.C. § 1962(a). Section 1962(a) states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, . . . through the collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Courts have interpreted this statute to require that "the compensable injury stem [sic] from the violation of the RICO section in question, so any injury under § 1962(a) must flow from the use or investment of racketeering income." *Parker & Parsley Petroleum Company v. Dresser Industries,* 972 F.2d 580, 584 (5th Cir.1992). Plaintiffs in the instant case allege injury from their payment of an unlawful debt, not from Defendants' investment of any unlawful debt income. Plaintiffs have,

therefore, plead [sic] no claim cognizable under section § 1962(a).

III. Conclusion

Plaintiffs have completely failed to plead a RICO claim. They have alleged no facts to sustain a claim for civil recovery under RICO and the facts that have been alleged demonstrate conclusively that no such claim could be proven. Therefore, this Court finds that Plaintiffs would not be entitled to recovery under any set of facts that could be proven consistent with the allegations in the complaint. Defendants' Motions to Dismiss Plaintiffs' lawsuit under Federal Rule of Civil Procedure 12(b)(6) are hereby GRANTED and the lawsuit is DISMISSED with prejudice. All other motions pending before the Court in this lawsuit are hereby DENIED as moot.

IT IS SO ORDERED.

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40953

In The Matter Of: THOMAS A RIVERA; SONIA DE LA ROSA; ANTONIO MARTINEZ; JOHN BRAUN

Debtors

THOMAS A RIVERA; SONIA DE LA ROSA; ROBERT P MCGUILL; ISMAEL ESPINOSA; MARICELA GARZA; STEPHEN PEREZ, for themselves and on behalf of all others similarly situated

Appellants

v.

AT&T CORP; TIME WARNER INC; TELE-COMMUNICATIONS INC; TCI CABLEVISION OF TEXAS, INC; TEXAS CABLE PARTNERS LP; KBL CABLESYSTEMS OF THE SOUTHWEST INC; TCI CENTRAL INC; TIME WARNER ENTERTAINMENT COMPANY L P; TWI CABLE INC

Appellees

Appeal from the United States District Court for the Southern District of Texas, Victoria

---

ON PETITION FOR REHEARING EN BANC

(Filed Apr. 29, 2002)

(Opinion 3/25/02, 5 Cir., ___, ___ F.3d ___)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

Judges KING, HIGGINBOTHAM, JONES, BARKSDALE, and CLEMENT did not participate in the consideration of the rehearing en banc.

APPENDIX 6

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 01-40953
Summary Calendar

In The Matter of: THOMAS A. RIVERA; SONIA DE LA ROSA; ANTONIO MARTINEZ; JOHN BRAUN;

Debtors.

THOMAS A. RIVERA; SONIA DE LA ROSA; ROBERT P. MCGUILL; ISMAEL ESPINOSA; MARICELA GARZA;; STEPHEN PEREZ, for themselves and on behalf of all others similarly situated,

Appellants,

VERSUS

AT&T CORP.; TIME WARNER, INC.; TELE-COMMUNICATIONS, INC.; TCI CABLEVISION OF TEXAS, INC.; TEXAS CABLE PARTNERS LP; KBL CABLESYSTEMS OF THE SOUTHWEST, INC.; TCI CENTRAL, INC.; TIME WARNER ENTERTAINMENT COMPANY LP; TWI CABLE, INC.,

Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(V-00-CV-93)

(Filed Mar. 25, 2002)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:*

The "Rivera appellants" (as defined in their Notice of Appeal filed under date of July 20, 2001) brought this suit against AT&T Corporation and the other corporations named in their Notice of Appeal (the "cable television providers") asserting a civil class action on behalf of themselves and other similarly situated [sic] under the federal Racketeering Influenced and Corrupt Organizations Act (RICO) premised upon the theory that the cable television providers were violating RICO by charging a $3 or $5 monthly fee for late payment of bills for television services. The cable television providers moved to dismiss the Rivera appellants' lawsuit under Rule 12(b)(6) because the Rivera appellants' petition failed to state a claim or cause of action upon which recovery could be made. The district judge granted such motion after entering a 12-page order which carefully analyzed the Rivera appellants' petition. The Rivera appellants now appeal to this Court.

We have carefully reviewed the briefs, the reply brief, the record excerpts, and relevant portions of the record itself. For the reasons stated by the district court in its Order of Dismissal filed April 18, 2001, we affirm the decision of the district court to dismiss with prejudice all of the Rivera appellants' claims against the cable television providers.

AFFIRMED.

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX 7

18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local

law enforcement), section 1512 (relating to tempering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346

(relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and

any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

---

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser,

the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

---

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not

limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States or any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

APPENDIX 8

Texas Codes Ann. § 305.001. Liability for Usurious Interest

(a) A creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

(1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received; or

(2) $2,000 or 20 percent of the amount of the principal, whichever is less.

(b) This section applies only to a contract or transaction subject to this subtitle.

(c) A creditor who charges or receives interest in excess of the amount contracted for, but not in excess of the maximum amount authorized by law, is not subject to penalties for usurious interest but may be liable for other remedies and relief as provided by law.

APPENDIX 9

CLOSED APPEAL

U.S. District Court
TXS – Southern District of Texas (Laredo)

CIVIL DOCKET FOR CASE #: 00-CV-134

Nolen v. Nucentrix Broadband, et al Filed: 10/19/00
Assigned to:
Judge Keith P Ellison Jury demand: Both
Referred to:
Magistrate Judge Adriana Arce-Flores
Demand: $0,000 Nature of Suit: 470
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 18:1964 Racketeering (RICO) Act

JOHN NOLEN, Individually and on behalf of all persons similarly situated plaintiff	Bryan Powers 361-767-9971 fax [COR LD NTC] Attorney at Law 4748A FM 624 Robstown, TX 78380 361-767-9970
	Enrique R Cuellar [term 12/07/00] 956-727-7468 fax Attorney at Law 1519 Washington Ste 200 Laredo, TX 78040 956-726-9320
NUCENTRIX BROADBAND NETWORKS INC aka	Donato D Ramos [COR NTC] Person Whitworth Ramos et al

Heartland Wireless Communications, Inc. defendant	602 E Calton Rd Laredo, TX 78042-6668 956-727-4441 Jorge C Rangel 361-883-2611 fax [COR NTC] Law Offices of Jorge Rangel 615 Upper N Broadway Ste 900 Corpus Christi, TX 78477 361-883-8500 Lewis T LeClair 214-978-4044 fax [COR NTC] McKool Smith PC 300 Crescent Ct Ste 1500 Dallas, TX 75201 214-978-4000 Brent N Bumgardner 214-978-4000 fax [COR LD NTC] McKool Smith PC 300 Crescent Ct Ste 1500 Dallas, TX 75201 214-978-4000
NUCENTRIX TELECOM defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
HEARTLAND CABLE TELEVISION defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NUCENTRIX BROADBAND NETWORKS defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NUCENTRIX INTERNET SERVICES defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NUCENTRIX SPECTRUM defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NUCENTRIX TELEPHONY defendant	Donata D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
CYBERWAVE HEARTNET defendant	Donata D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
CLEAR CHOICE TV defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NUCENTRIX INTERNET SERVICES INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
HEARTLAND CABLE TELEVISION INC defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
SPECTRUM RESOURCES INC,	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
WIRELESS ONE INC defendant	Donato d Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]

	John C Eichman 214-855-4300 [COR LD NTC] Jenkens & Gilchrist 1445 Ross Ave Ste 3200 Dallas, TX 75202 214-855-4372
CS WIRELESS SYSTEMS INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
	John C Eichman (See above) [COR LD NTC]
CAI WIRELESS SYSTEMS INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]

UNIDENTIFIED PARTIES, 1-34 defendant	Lewis T LeClair (See above) [COR NTC]
STEPHEN FEINBURG defendant	Donato D Ramos (See above) [COR NTC] Jorge C Rangel (See above) [COR NTC] Lewis T LeClair (See above) [COR NTC]
CERBERUS PARTNERS LP defendant	Donato D Ramos (See above) [COR NTC] Jorge C Rangel (See above) [COR NTC] Lewis T LeClair (See above) [COR NTC]
CERBERUS INTERNATIONAL LTD defendant	Donato D Ramos (See above) [COR NTC] Jorge C Rangel (See above) [COR NTC]

	Lewis T LeClair (See above) [COR NTC]
CERBERUS INSTITUTIONAL PARTNERS LP, its joint ventures and alliance members	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
DIRECTV INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
	Mike Mills [COR LD NTC] Atlas & Hall P O Drawer 3725 McAllen, TX 78502 956-682-5501

HUGHES ELECTRONICS CORPORATION defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
	Mike Mills (See above) [COR LD NTC]
GENERAL MOTORS CORPORATION defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
	Mike Mills (See above) [COR LD NTC]
CISCO SYSTEMS INC defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
CROSS COUNTRY WIRELESS INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
RURAL VISION JOINT VENTURE, its officers and directors defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
CARROLL D MCHENRY defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
MARJEAN HENDERSON defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C. Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
AMY E IVANOFF defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
RICHARD B GOLD defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
TERRY S PARKER defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
NEIL S SUBIN defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
R TED WESCHLER defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
ROBERT S CECIL defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
JACK R CROSLY defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
J R HOLLAND, JR defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
JOHN A SPRAGUE defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
L ALLEN WHEELER defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
ISP ALLIANCE INC defendant	Donato D Ramos (See above) [COR NTC]

	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
SEA TOWERS INC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
	William B Dawson 214-999-7926 fax [COR LD NTC] Vinson & Elkins 2001 Ross Ave Dallas, TX 75201-2975 214-220-7926
WIRELESS ENTERPRISES LLC defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]

	Lewis T LeClair (See above) [COR NTC]
PEOPLES CHOICE TV CORP, defendant	Donato D Ramos (See above) [COR NTC]
	Jorge C Rangel (See above) [COR NTC]
	Lewis T LeClair (See above) [COR NTC]
CERBERUS INTERNATIONAL, LTD. defendant	
CERBERUS INSTITUTIONAL PARTNERS, L.P. defendant	
STEPHEN FEINBERG defendant	

10/19/00	1	IMG	COMPLAINT by John Nolen filed; FILING FEE $150.00 RECEIPT #512974 (jm)
10/19/00	2		MOTION TO SUSPEND RULE 26 and adopt procedures for complex litigation by John Nolen, Motion Docket Date 11/8/00 [2-1] motion, filed. (jm)

10/19/00	–		2 SUMMONS issued (jm)
10/30/00	3		Order setting Initial Pretrial and Scheduling Conference on 2:00 11/30/00 before Magistrate Judge Adriana Arce-Flores and Order to Disclose Interested Persons, filed. ( ) Parties notified. (jm)
10/30/00	–		CASE REFERRED to Magistrate Judge Adriana Arce-Flores (jm)
11/13/00	4		ANSWER to Complaint by DirecTV Inc (Added attorney Mike Mills), filed.; jury demand (jm) [Entry date 11/14/00] [Edit date 11/14/00]
11/13/00	5		RESPONSE by Nucentrix Broadband Networks, Inc to [2-1] motion to suspend rule 26 and adopt procedures for complex litigation, filed. (jm) [Entry date 11/14/00]
11/13/00	6		MOTION to dismiss by Nucentrix Broadband Networks, Inc. & memorandum in support, Motion Docket Date 12/3/00 [6-1] motion, filed. (jm) [Entry date 11/15/00]
11/16/00	7	IMG	ORDER reset scheduling conference for 2:00 1/22/01 before Magistrate Judge Adriana Arce-Flores, entered; Parties notified. (signed by Magistrate Judge Adriana Arce-Flores) (jm) [Entry date 11/17/00]

11/28/00	8		NOTICE of change of telephone & fax numbers by atty for pla Bryan Powers, filed (jm) [Entry date 11/29/00]
11/30/00	9		MOTION for Henry Cuellar & Blanca P. Galo to withdraw as attorney by Bryan Powers, atty for pla John Nolen, Motion Docket Date 12/20/00 [9-1] motion, filed. (jm) [Entry date 12/01/00]
12/7/00	10	IMG	ORDER GRANTING [9-1] motion for Henry Cuellar & Blanca P. Galo to withdraw as attorney, entered; Parties notified. (signed by Magistrate Judge Adriana Arce-Flores) (jm)
12/22/00	11		MOTION to dismiss & memo of law in support thereof by Nucentrix Broadband, Motion Docket Date 1/11/01 [11-1] motion, filed. (jm)
12/16/00	12		MOTION to extend time to respond to cmp by Wireless One Inc, CS Wireless Systems, Motion Docket Date 1/15/01 (12-1) motion, filed. (jm)
12/29/00	13		ANSWER to Complaint by General Motors Corp (Added attorney Mike Mills), filed. (jm)
1/3/01	14		MOTION to dismiss & memorandum of law in support by subsidiary defts, Motion Docket Date 1/23/01 [14-1] motion, filed. (jm) [Entry date 01/09/01]

1/8/01	15	IMG	ORDER reset scheduling conference for 8:30 1/26/01 before Judge Keith P. Ellison; reference to the Magistrate Judge is withdrawn, entered; Parties notified. (signed by Judge Keith P. Ellison) (jm) [Entry date 01/10/01]
1/16/01	16	IMG	ORDER that hrg scheduled in this case for 1/22/01 at 2pm is CANCELED. All pretrial matters in this case will be heard by Judge Ellison, entered; Parties notified. (signed by Magistrate Judge Adriana Arce-Flores) (jm) [Entry date 01/17/01]
1/16/01	18		MOTION for leave to file jt report on meeting required by rule 26(f) w/o the signature of pla by Nucentrix Broadband, Motion Docket Date 2/5/01 [18-1] motion, filed. (jm) [Entry date 01/18/01]
1/16/01	19		RESPONSE in opposition by Nucentrix Broadband to pla's mtn to file jt report w/o the signature of all ptys, filed. (jm) [Entry date 01/18/01]
1/16/01	20		MOTION for leave to file jt report w/o signatures of all ptys by John Nolen, Motion Docket Date 2/5/01 [20-1] motion, filed. (jm) [Entry date 01/18/01]
1/18/01	17		RESPONSE by John Nolen to [14-1] motion to dismiss for failure to state a claim, filed. (jm)

1/25/01	21		MOTION for leave to file reply in support of their mtns to dismiss by Nucentrix dfts, Motion Docket Date 2/14/01 [21-1] motion, filed. (jm) [Entry date 01/26/01]
1/26/01	23	IMG	ORDER entered GRANTING Deft Wireless One and CS Wireless Systems' [12-1] motion to extend time to respond to complaint until Jan 29, 2001. Parties notified. (signed by Judge Keith P. Ellison) (ps) [Entry date 02/02/01]
1/26/01	24		Minute entry: SCHEDULING CONFERENCE held. Counsel appeared. The court proposed that an order for all the schedules will be entered. terminated deadlines Ct Reporter: L Gomez. (ps) [Entry date 02/02/01]
9/01	22	IMG	ORDER entered: Pursuant to a telephonic status conference, the Court issues the following deadlines: Pltf must effect service upon all named Defts by 2/26/01, Defts must file Motions to Dismiss by 4/11/01; Pltf must file all responses by 5/28/01; Defts must file all replies to Pltfs responses by 6/12/01. Parties notified. (signed by Judge Keith P. Ellison) (ps) [Entry date 02/02/01]
2/2/01	–		SUMMONS issued 17) in Corpus Christi (ps) [Entry date 02/08/01]

2/9/01	25		Wireless Defts' MOTION to dismiss, by Wireless One Inc, CS Wireless Systems, CAI Wireless Systems, Cross Country, Motion Docket Date 3/1/01 [25-1] motion, filed. (ps) [Entry date 02/27/01]
2/9/01	26		BRIEF by Wireless One Inc, CS Wireless Systems, CAI Wireless Systems, Cross Country in support of [25-1] motion to dismiss, filed. (ps) [Entry date 02/27/01]
2/20/01	27		ANSWER to Complaint by SBA Towers Inc (Added attorney William B Dawson), filed. (ps) [Entry date 02/27/01]
2/22/01	28		ANSWER to Complaint by Hughes Eklectronics (Added attorney Mike Mills), filed.; jury demand (ps) [Entry date 02/28/01]
3/09/01	29		FIRST AMENDED ANSWER to Complaint by SBA Towers Inc: amends [27-1] answer, filed. (ps) [Entry date 03/15/01]
4/10/01	30	IMG	Defendant SBA'S Towers, INC., MOTION to dismiss and supporting brief, Motion Docket Date 4/30/01 [30-1] motion, filed. (mm) [Entry date 04/17/01]
4/11/01	31	IMG	DEFENDANT'S (Peoples Choice) MOTION to dismiss complaint for failure to state a claim against Peoples Choice upon which relief can

be granted, Motion Docket Date 5/1/01 [31-1] motion, filed. (mm) [Entry date 04/17/01]

4/11/01 32 IMG MOTION to dismiss claims asserted against its trademark memorandum of law in support thereof by Nucentrix Broadband, Motion Docket Date 5/1/01 [32-1] motion, filed. (mm) [Entry date 04/17/01]

4/11/01 34 IMG MOTION to dismiss by Defendant Hughes Electronics, and brief in support thereof Motion Docket Date 5/1/01 [34-1] motion, filed. (mm) [Entry date 04/18/01]

4/11/01 35 IMG MOTION to dismiss by Defendant General Motors Corp, and brief in support thereof Motion Docket Date 5/1/01 [35-1] motion, filed. (mm) [Entry date 04/18/01]

4/11/01 36 IMG MOTION to dismiss by Defendant Cisco Systems Inc, Motion Docket Date 5/1/01 [36-1] motion, filed. (mm) [Entry date 04/18/01]

4/11/01 37 IMG MOTION to dismiss by Defendants Stephen Feinburg, Cerberus Partners LP, Cerberus, Cerberus, Motion Docket Date 5/1/01 [37-1] motion, filed. (mm) [Entry date 04/18/01]

4/11/01 33 IMG MOTION to quash attempted service on Rural Vision Joint Venture, or in the alternative motion to dismiss

Pltf's complaint against Rural Vision Joint Venture by Deft Nucentrix Broadband, Motion Docket Date 5/1/01 [33-1] motion, filed. (mm) [Entry date 04/20/01]

4/18/01 38 IMG BRANT M LAUE'S, attorney for deft People's Choice TV Corp., MOTION to appear pro hac vice, Motion Docket Date 5/8/01 [38-1] motion, filed. (mm) [Entry date 04/19/01]

5/29/01 39 IMG MOTION by defts Cerberus Partners, L.P., Cerberus International, Ltd., Cerberus Institutional Partners, L.P., and Stephen Feinberg for attorney A. Matthew Boxer to appear pro hac vice, Motion Docket Date 6/18/01 [39-1] motion, filed. (mm) [Entry date 05/31/01] [Edit date 05/31/01]

5/29/01 40 IMG MOTION for attorney Lawrence M. Rolnick to appear pro hac vice by defts Cerberus Partners LP, Cerberus International, Ltd., Cerferus Institutional Partners, L.P., and Stephen Feinberg, Motion Docket Date 6/18/01 [40-1] motion, filed. (mm) [Entry date 05/31/01]

6/4/01 41 IMG MOTION for leave to file amended complaint by platf John Nolen, Motion Docket Date 6/24/01 [41-1] motion, filed. (mm) [Entry date 06/07/01]

6/4/01 43 IMG ORDER granting [38-1] attorney's Brant M. Laue's Application to

			appear pro hac vice as to deft People's Choice TV Corp., entered; Parties notified. (signed by Judge Keith P. Ellison) (mm) [Entry date 06/10/01] [Edit date 06/10/01]
6/4/01	44	IMG	ORDER granting [39-1] attorney's A. Matthew Boxer of the Law Firm of Lowenstein Sandler, P.C., application to appear pro hac vice, as to defts Cerberus Partners, L.P., Cerberus International, L.T.D., Cerberus Institutional, L.P., and Stephen Feinberg, entered; Parties notified. (by Judge Keith P. Ellison) (mm) [Entry date 06/10/01]
6/4/01	45	IMG	ORDER granting [40-1] attorney's Lawrence M. Rolnic, of the Law Firm of Lowerstein Sandler, P.C., application to appear pro hac vice, as to defts Cerberus Partners, L. P., Cerberus international, L. T. D., Institutional Partners, L. P., and Stephen Feinberg, entered; Parties notified. (signed by Judge Keith P. Ellison) (mm) [Entry date 06/10/01]
6/4/01	42	IMG	RESPONSE by pltf John Nolen in opposition to [53-1] deft's motion to dismiss, filed (mm) [Entry date 07/06/01]
6/12/01	46	IMG	REPLY BRIEF by defts Cerberus Partners LP, Cerberus International, Cerberus Institutional, and Stephen Feinberg in support of motion to

dismiss, filed. (mm) [Entry date 06/14/01]

6/12/01 47 IMG RENEWED MOTION to dismiss, reply to platf's consolidated opposition to defts' motions to dismiss, and, alternatively, motion for summary judgment by deft Nucentrix Broadband Networks, Inc., et al, Motion Docket Date 7/2/01 [47-1] motion, filed. (mm) [Entry date 06/14/01]

6/12/01 48 IMG RESPONSE by deft SBA Towers Inc to [41-1] platf's motiōn for leave to file amended complaint and replies in support of SBA'S motion to dismiss, filed. (mm) [Entry date 06/14/01]

6/12/01 49 IMG UNOPPOSED MOTION to extend time to file reply by defts Wireless One Inc, CS Wireless Systems, CAI Wireless Systems, Cross Country, Wireless Enterprises, Motion Docket Date 7/2/01 [49-1] motion, filed. (mm) [Entry date 06/14/01]

6/13/01 50 IMG ORDER granting [47-1] deft's motion to dismiss, reply to platf's consolidated opposition to defts' motions to dismiss, and, alternatively, motion for summary judgment granting [41-1] pltf's motion for leave to file amended complaint granting [32-1] deft's motion to dismiss claims asserted against its trademarks, trademark applications, and alleged assumed names, and memorandum

			of law in support thereof granting [31-1] deft's motion to dismiss complaint for failure to state a claim against Peoples Choice upon which relief can be granted granting [37-1] deft's motion to dismiss granting [36-1] deft's motion to dismiss granting 935-1] deft's motion to dismiss granting [34-1] motion to dismiss granting [33-2] deft's motion to dismiss granting [30-1] deft's motion to dismiss and supporting brief granting [25-1] deft's motion to dismiss granting [14-1] deft's motion to dismiss [11-1] deft's motion to dismiss granting [6-1] deft's motion to dismiss, The lawsuit is hereby DISMISSED with prejudice and all other motions pending before the Court in this lawsuit are DENIED as moot, entered; Parties notified. (signed by Judge Keith P. Ellison) (mm) [Entry date 06/14/01]
6/13/01	–		Case closed (mm) [Entry date 06/14/01]
6/13/01	51	IMG	RENEWED MOTION to dismiss by deft Peoples Choice TV Corp., Motion Docket Date 7/3/01 [51-1] motion, filed. (mm) [Entry date 06/14/01]
6/13/01	52	IMG	REPLY MEMORANDUM by Peoples Choice TV in support of [51-1] deft's renewed motion to dismiss, and [31-1] deft's motion to dismiss complaint for failure to state a claim against Peoples Choice upon which relief can

			be granted, field. (mm) [Entry date 06/14/01]
6/13/01	54	IMG	AFFIDAVIT OF J. Curtis Henderson, filed (mm) [Entry date 06/15/01]
6/14/01	53	IMG	MOTION to dismiss by deft Cisco Systems Inc, Motion Docket Date 7/4/01 [53-1] motion, filed. (mm) [Entry date 06/15/01]
6/27/01	55	IMG	PLATF'S MOTION to alter or amend the order of dismissal by John Nolen, Motion Docket Date 7/17/01 [55-1] motion, filed. (mm)
6/29/01	56	IMG	ORDER denying [55-1] motion to alter or amend the order of dismissal; Because platf has failed to demonstrate that the Court committed clear legal error, the motion is DENIED, entered; Parties notified. (signed by Judge Keith P. Ellison) (mm) [Entry date 07/02/01]
7/13/01	57	IMG	NOTICE OF APPEAL of [50-1] order by John Nolen, filed. Fee Status: 105.00 Receipt #:514556 Appeal record due on 7/28/01 (mm)
7/18/01	–		Certified and transmitted record on appeal consisting of 2 volumes to U.S. Court of Appeals: [57-1] appeal. Parties ntfd. (mm)

APPENDIX 10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JOHN NOLEN, individually and on behalf of all persons similarly situated, plaintiff, VS. NUCENTRIX BROADBAND NETWORKS INC, a/k/a HEARTLAND WIRELESS COMMUNICATIONS INC; its marks and assumed names, NUCENTRIX TELECOM, HEARTLAND CABLE TELEVISION, NUCENTRIX BROADBAND NETWORKS, NUCENTRIX INTERNET SERVICES, NUCENTRIX SPECTRUM, NUCENTRIX TELEPHONY, CYBERWAVE HEARTNET, and CLEAR CHOICE TV; its subsidiaries, NUCENTRIX INTERNET SERVICES INC, HEARTLAND CABLE TELEVISION INC, NUCENTRIX SPECTRUM RESOURCES INC, WIRELESS ONE INC, CS WIRELESS SYSTEMS INC, CAI WIRELESS SYSTEMS INC, and JOHN DOES 1-34; its owners, STEPHEN FEINBURG, CERBERUS PARTNERS LP, CERBERUS INTERNATIONAL LTD, and CERBERUS INSTITUTIONAL PARTNERS LP; its joint venturers and alliance members, DIRECTV INC, HUGHES	Civil Action No. L-00CV134 Jury

ELECTRONICS CORPORATION,)
GENERAL MOTORS CORPORA-)
TION, CISCO SYSTEMS INC,)
CROSS COUNTRY WIRELESS INC,)
and RURAL VISION JOINT VEN-)
TURE, its officers and directors,)
CARROLL D. McHENRY, MARJEAN)
HENDERSON, AMY E. IVANOFF,)
RICHARD B. GOLD, TERRY S.)
PARKER, NEIL S. SUBIN, R. TED)
WESCHLER, ROBERT S. CECIL,)
JACK R. CROSLY, J.R. HOLLAND)
JR., JOHN A SPRAGUE, and L.)
ALLEN WHEELER; and trade asso-)
ciates, ISP ALLIANCE INC, SBA)
TOWERS INC, WIRELESS ENTER-)
PRISES LLC, and PEOPLES)
CHOICE TV CORP,)

defendants.

COMPLAINT

(Filed Oct. 19, 2000)

Plaintiff alleges as follows:

Introduction

1. This law suit concerns the Nucentrix Broadband Networks Inc's ("Nucentrix") attempt to make itself profitable by collecting illegal fees from its subscribers in connection with its business of lending them electronic radio receiving and transmitting devices. In Texas, Oklahoma, Arkansas, Kansas, Missouri, Iowa, Illinois, Ohio, Indiana, Kentucky, and Pennsylvania Nucentrix sells its users subscription television programming, internet access

and services, and voice telephony for a service fee. If the user is late in paying the debt, Nucentrix collects a fee from the user for paying his or her debt late – a fee that is far in excess of that allowed by the usury caps on interest imposed by the constitutions and statutes of these States. Nucentrix collects these late fees in clear violation of the federal Racketeering Influenced and Corrupt Organizations Act ("RICO").

2. The relief provided by RICO is particularly appropriate for this lawsuit because of RICO's nationwide reach to outlaw collection of unlawful debt. Plaintiff asks the court to enjoin further implementation of the collection of the unlawful debt and grant relief that declares the practice illegal. Plaintiff also asks the court to give him and the class members RICO damages and restore the amounts which Nucentrix has illegally collected.

3. The class procedures provided by Federal Civil Procedure Rule 23 are particularly appropriate for this lawsuit because of the small individual damages – typically $5.00. As the Supreme Court wrote in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980), for the vast number of claimants, "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages."

Jurisdiction

4. This Court has jurisdiction of this civil action under 18 U.S.C. § 1964(a) and (c), Racketeer Influenced and Corrupt Organizations Act ("RICO"), and federal question jurisdiction under 28 U.S.C. § 1331.

Definitions

5. As used in this complaint "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

6. As used in this complaint " a broadband network operator" or "a system operator" is any person or group of persons who provides wireless broadband service over a broadband network and directly or through one or more affiliate, who owns or controls a license or authority to operate a broadband network, who owns a significant interest in such broadband network, or who otherwise controls or is responsible for, through any arrangement, the management or operation of such a broadband network.

7. As used in this complaint "wireless broadband service" is the high-speed transmission to or reception from subscribers and users of video programs, internet access, or voice telephony.

8. As used in this complaint "a broadband network" is a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide wireless broadband service to multiple subscribers and users within a community.

9. As used in this complaint, the term "equipment" means the mechanical and electronic things of value which are lent to users to deliver wireless broadband service including but not limited to signal receivers, converters, converter-descramblers, remote control units, security devices, disk antennae, addressable control modules, A/B

switches, coaxial cable which is not inside wiring, and parental lock-out devices.

10. As used in this complaint, "service fee" means a fee charged to the subscriber for providing equipment and wireless broadband service.

11. As used in this complaint "a late fee" means a charge to a subscriber or user imposed by the system operator in addition to the service fee and which appears on the monthly bill when the subscriber withholds payment of the service fee.

The Parties

THE PLAINTIFF

12. Plaintiff, John Nolen, is a citizen of Texas residing in Duval County and the Southern District of Texas. He has been a subscriber to the wireless broadband services of Nucentrix and its predecessors since August, 1996 and has a subscriber service agreement with Nucentrix. Nucentrix has collected a $5.00 late fee from him on at least two occasions within the four years preceding the filing of this complaint.

THE DEFENDANTS

The Operators

13. Defendant, Nucentrix Broadband Networks Inc ("Nucentrix"), is a broadband network operator who operates, manages, or controls, directly or indirectly, wireless broadband networks located in the counties comprising the Laredo Division of the Southern District of Texas, including Webb County, Texas. Nucentrix is found

in the Laredo Division in that its agents transact its sales and service business under the assumed name, Heartland Cable Television, at 2611 Loop 20, Laredo, Webb County, Texas 78403.

14. Nucentrix does business under the names of Nucentrix Telecom, Heartland Cable Television, Nucentrix Broadband Networks, Nucentrix Internet Services, Nucentrix Spectrum, Nucentrix Telephony, cyberwave Heartnet, and Clear Choice TV. Nucentrix changed its name from Heartland Wireless Communications Inc on April 1, 1999, when it emerged from a reorganization under Chapter 11 of the U.S. Bankruptcy Code.

15. Plaintiff's choice of venue as to Nucentrix as a system operator is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a).

Nucentrix Subsidiaries

16. Nucentrix operates its wireless broadband networks by and through its subsidiaries, Nucentrix Internet Services Inc, Heartland Cable Television, Inc, Nucentrix Spectrum Resources Inc, Wireless One Inc, CS Wireless Systems Inc, CAI Wireless Systems Inc, and 34 wholly owned subsidiaries that are identified here as John Does 1-34 and who themselves are principal system operators. The ends of justice require that the subsidiaries be brought before this court.

17. Plaintiff's choice of venue as to the subsidiaries, as the ends of justice require, is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

Nucentrix Owners, Officers, and Directors

18. Nucentrix is controlled in the operation of its wireless broadband networks by its owners, Stephen Feinburg, Cerberus Partners LP, Cerberus International LTD, and Cererbus [sic] Institutional Partners LP, and by its officers and directors, Carroll D. McHenry, Marjean Henderson, Amy E. Ivanoff, Richard B. Gold, Terry S. Parker, Neil S. Subin, R. Ted Weschler, Robert S. Cecil, Jack R. Crosly, J.R. Holland Jr, John A. Sprague, and L. Allen Wheeler, who themselves are principal system operators. The ends of justice require that the owners, officers and directors be brought before this court.

19. Plantiff's choice of venue as to the owners, officers, and directors, as the ends of justice require, is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

Nucentrix Joint Venturers, Alliance Members, and Trade Associates

20. The operation and control of Nucentrix wireless broadband networks is shared by Nucentrix joint venturers and alliance members, DirecTV Inc, Hughes Electronics Corporation, General Motors Corporation, Cisco Systems Inc, Cross Country Wireless Inc, and Rural Vision Joint Venture, and by its trade associates, ISP Alliance Inc, SBA Towers Inc, Wireless Enterprises LLC, and Peoples Choice TV Corp. The ends of justice require that the joint venturers, alliance members, and trade associates be brought before this court.

21. Plaintiff's choice of venue as to the joint venturers, alliance members and trade associates, as the ends of

justice require, is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

The Nature of Nucentrix Business

22. Nucentrix is in the business of lending money or things of value through advancing credit and supplying equipment to its customers so they may receive and transmit the signals which carry television programs, internet access, and voice telephony. In connection with such business, the lending is at a rate which is more than twice the legal interest rate under the laws relating to usury of the States in which Nucentrix operates. The customer debt thus incurred is unenforceable under State law in whole or in part as to principal or interest because of the laws relating to usury.

23. Nucentrix, through the conduct and participation, directly and indirectly, by the other defendants of its affairs, provides fixed wireless broadband services in markets in the central United States. Nucentrix controls up to 196 MHz of radio spectrum licensed by the Federal Communications Commission in 92 markets. It currently provides always-on, high-speed wireless Internet access service to small businesses and home offices and two-way wireless broadband Internet access in Sherman-Denison and Austin, Texas.

24. Nucentrix has a strategic alliance with Cisco Systems, Inc. to deploy a Voice over Internet telephony system over a Cisco powered network.

25. Nucentrix uses its radio spectrum to provide wireless subscription television programs operating in 58 markets in nine States, having about 130,100 wireless

cable subscribers including 8,300 "combo" subscribers who also subscribe to DirecTV programming sold by Nucentrix. The alliance with DirecTV provides for a percentage commission to Nucentrix on each subscriber receiving a DirecTV package as well as activation, equipment and marketing subsidies.

26. Nucentrix services and received commission on about 13,900 subscribers who only receive DirecTV programming.

27. As long ago as December 31, 1996, Nucentrix wrote off 33,000 subscribers with delinquent balances. It is reasonably probable that Nucentrix collected late fees from a far greater number of subscribers in each 12-month period preceding the filing of this complaint.

Unenforceable Debt

28. The charge and payment of fees for cable service and equipment are governed by a subscription contract between Nucentrix and its subscriber, the terms of which are set out in the installation orders, and Nucentrix literature and bills.

29. Under the terms of the subscription contract and as a regular business practice the Nucentrix service fee is charged in advance of the service and in advance of the use of the equipment. The charge of the service fee creates a principal debt owed by the subscriber and is payable on a date certain – the billing date. The charge of the late fee creates a right granted by Nucentrix to the subscriber to defer payment of the debt, until a date certain 30 days after the debt becomes payable, in consideration of payment of a late fee.

30. For the typical subscriber who defaults on the payment of the service fee on the date it becomes payable until 30 days later, a larger sum (service fee plus $5.00) is made payable and the difference between the two sums is not merely the interest value of the smaller sum, in all cases the difference is more than twice the interest calculated at the highest legal rate under the usury laws of the State.

31. In 1996 the average monthly revenue for Nucentrix per subscriber was $30.22 and in 1997 $33.52. Using the typical $5.00 late fee charged for the 30 day period between the service fee becoming payable and the late fee being charged, the late fee constitutes interest at the rate of 198% per annum in 1996, and 178% per annum in 1997. It is probable that the ratios did not change significantly in 1998 and 1999.

Facts Regarding Nucentrix Transactions With Plaintiff

32. On November 27, 1999, after 30 days, the sum of $38.77 was made payable to Heartland Cable Television upon John Nolen's default in the payment of the sum of $33.77. The difference between the two sums is $5.00. The maximum legal interest rate for an agreement to pay money that does not specify the interest rate, is 6% per annum. The interest value of the smaller sum of $33.77 is no more than $.18. John Nolen paid Heartland Cable Television the larger sum of $38.77 and Heartland Cable Television received the larger sum. Heartland Cable Television never returned the difference of $5.00 to John Nolen.

33. Each of the defendants aided, abetted, counseled, commanded, induced, procured, and willfully caused the collection of the unlawful debt of $38.77 from John Nolen and the use of the unlawful debt or part thereof, directly or indirectly, in acquisition of an interest in or the establishment or operation of Nucentrix.

34. Each of the defendants except Nucentrix conducted or participated, directly or indirectly, in the conduct of the affairs of Nucentrix through the collection of the unlawful debt of $38.77 from John Nolen.

Class Allegations

Plaintiff Class

35. This action is brought on behalf of a class consisting of all persons from whom any of the defendants or their affiliates or predecessors have collected a late fee.

36. Plaintiff seeks certification under Federal Rule of Civil Procedure 23(b)(2), or in the alternative or in addition, under Federal Rule of Civil Procedure 23(b)(3).

37. The class is so numerous that joinder of all members is impractical.

38. There are questions of law and fact common to the class, which questions predominate over any question affecting only individual class members.

39. Plaintiff's claim is typical of claims of the class members, in that they are based on the same legal and remedial theories.

40. Plaintiff, as class representative, will fairly and adequately protect the interests of the class. Neither

plaintiff nor his counsel have any interests which might cause them to not vigorously pursue this action.

41. Certification is appropriate under Federal Rule of Civil Procedure 23(b)(2), in that defendants have imposed uniform policies with respect to the entire class and injunctive or declaratory relief against the imposition of the policies is necessary. The monetary relief sought, including statutory damages, does not detract from the cohesiveness of the class.

42. Alternatively or in addition, plaintiffs request certification under Federal Rule of Civil Procedure 23(b)(3). The questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The only individual questions concern the size of the late fee that was charged the member and the period of time for which the late fee was charged. This can be determined by a ministerial examination of the defendant's financial files.

43. A class action is superior to other methods for the fair and efficient adjudication of this dispute. Because most subscribers cannot recognize a charge for forbearance buried in defendants' bills, the members will not realize they have a claim. Furthermore, even if a subscriber did recognize this claim, the size of the claims involved does not warrant individual litigation of the magnitude and complexity necessary to challenge the legality of the late charges.

44. Plaintiff seeks relief for members of the class on the same basis as he seeks relief for himself.

COUNT I

(Federal Racketeer Influenced and Corrupt Organizations Act – Use of Proceeds of Collection of Unlawful Debt in Operation of Enterprise)

45. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

46. This claim for relief is asserted against all defendants, and arises under 18 U.S.C. 1962(a) and (d).

47. At all relevant times plaintiff was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

48. At all relevant times each defendant was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(a), each defendant was "capable of holding a legal or beneficial interest in property."

49. At all relevant times Nucentrix Broadband Networks Inc constituted an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a). The enterprise is an ongoing organization. The enterprise has engaged in, and its activities have affected interstate and foreign commerce.

50. Defendants, through the charge and receipt of late fees in connection with their business of advancing credit and lending equipment at a usurious rate, have engaged in the collection of unlawful debt which generated income for each of them.

51. Defendants have used their illicit income in the operation of the enterprise in violation of 18 U.S.C. § 1962(a).

52. Each defendant also conspired to violate 18 U.S.C. § 1962(a) in violation of 18 U.S.C. § 1962(d).

53. Plaintiffs have been injured in their business and property by reason of defendants' violations of 18 U.S.C. § 1962(a) and (d), because plaintiffs have been required [sic] make illegal late fee payments as a condition to receiving wireless broadband service and equipment. In absence of defendants' violation of 18 U.S.C. § 1962(a) and (d), these late fees would have been substantially reduced. Under the provisions of 18 U.S.C. 1964(c), plaintiffs are entitled to bring this action and to recover treble damages, the costs of bringing this suit, and reasonably attorney fees.

COUNT II

(Federal Racketeer Influenced and Corrupt Organizations Act – Conducting and Participating in the Conduct of Enterprise's Affairs)

54. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

55. This claim for relief is asserted against all defendants except Nucentrix Broadband Networks Inc and arises under 18 U.S.C. 1962(c) and (d).

56. At all relevant times plaintiff was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

57. At all relevant times each defendant was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(a), as each defendant was "capable of holding a legal or beneficial interest in property."

58. At all relevant times Nucentrix Broadband Networks Inc constituted an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c). The enterprise is an ongoing organization. The enterprise has engaged in, and its activities have affected interstate and foreign commerce.

59. Defendants except for Nucentrix Broadband Networks, Inc, through the charge and receipt of late fees in connection with their business of lending equipment at a usurious rate, have engaged in the collection of unlawful debt which generated income for each of them.

60. Defendants except for Nucentrix Broadband Networks Inc have conducted or participated, directly, or indirectly, in the conduct of the enterprise's affairs through collection of unlawful debt in violation of 18 U.S.C. § 1962(c).

61. Each defendant except for Nucentrix Broadband Networks Inc also conspired to violate 18 U.S.C. § 1962(c) in violation of 18 U.S.C. § 1962(d).

62. Plaintiff has been injured in his business and property by reason of such defendants' violations of 18 U.S.C. § 1962(c) and (d), because plaintiff has been required to make illegal late fee payments as a condition to receiving wireless broadband service and equipment. In absence of defendants' violation of 18 U.S.C. § 1962(c) and (d), these late fees would have been substantially reduced. Under the provisions of 18 U.S.C. 1964(c), plaintiff is entitled to bring this action and to recover treble damages, the costs of bringing this suit, and reasonably [sic] attorney fees.

COUNT III

(Federal Racketeer Influenced and Corrupt Organizations Act – Injunctive and Declaratory Relief to Prevent Violations)

63. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

64. Under the provisions of 18 U.S.C. 1964(a), plaintiffs are entitled to bring this action to enjoin and declare unlawful the defendants' acts committed in the collection of unlawful debt.

COUNT IV

(Federal Racketeer Influenced and Corrupt Organizations Act – Creation of Constructive Trust for Restitution of Late Fees Which Unjustly Enrich Defendants)

65. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

66. Defendants have been and will be unjustly enriched at the expense of the plaintiff by the charge and receipt of late fees.

67. In equity and good conscience, it would be unjust for defendants to enrich themselves at the expense of the plaintiff.

68. Because plaintiff has been required to make illegal late fee payments as a condition to receiving cable television service and equipment, he is entitled to full restitution of all fees wrongfully acquired by defendants by means of collection of unlawful debt.

69. Plaintiffs are entitled under the principles of equity to an order of the court that defendants hold in trust as constructive trustees whatever money they received or will receive, to the extent that the money is an unjust benefit or enrichment accruing to the defendants by their intentional acts in collecting an unlawful debt from plaintiff, for the use and benefit of the plaintiffs, and that the plaintiff be declared the owner of the monies so collected.

Nucentrix Bankruptcy Stay and Discharge

70. Not withstanding any allegation to the contrary, the relief sought against Nucentrix Broadband Networks Inc by virtue of this complaint is hereby abandoned as though never sought if such relief operates as a violation of the automatic stay of December 4, 1998, of the U.S. Bankruptcy Court, District of Maryland, in favor of Nucentrix Broadband Networks, Inc, unless such relief is excepted from discharge by U.S. Bankruptcy Code § 523.

Request for Relief

Wherefore, plaintiff on his behalf and on behalf of the class members, requests relief and judgment against defendants as follows:

1. For equitable and injunctive relief of disgorgement, payment of restitution to all members of the class, and imposition of constructive trust.

2. For award of compensation to plaintiff and the class for damages caused by defendants' actions in violation of law, together with interest and costs.

3. For award of treble damages pursuant to 18 U.S.C. § 1964(c).

4. For award to plaintiff and the class members of reasonable attorney fees.

5. For such other and further relief as this court may deem equitable, just and proper.

Respectfully submitted,

/s/ Bryan Powers
Bryan Powers
SBN: 16215700
4748A FM 624
Robstown, TX 78380
TEL: 361-937-8009
FAX: 361-937-6066
Attorney-in-Charge for Plaintiff

Henry Cuellar
SBN: 05202350
1519 Washington St.
Laredo, Texas 78040
TEL: 956-726-9320
FAX: 956-727-7468
Attorney for Plaintiff

Blanca P. Galo
State Bar No. 15731575
GENDRY & SPRAGUE, P.C.
645 Lockhill Selma
San Antonio, Texas 78216-5057
Telephone: (210) 349-0511
Facsimile: (210 349-2760
Attorney for Plaintiff

PLAINTIFF'S DEMAND FOR JURY TRIAL

Plaintiff, John Nolen, asserts his rights under the Seventh Amendment to the U.S. Constitution and demands a trial by jury on all issues, in accordance with Federal Rule of Civil Procedure 38.

/s/ Bryan Powers
Bryan Powers

APPENDIX 11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JOHN NOLEN,	)	
plaintiff,	)	Civil Action No. L-00-CV134
v.	)	
NUCENTRIX BROADBAND NETWORKS INC. *et al.*	)	Jury
defendants.	)	

AMENDED COMPLAINT

John Nolen alleges as follows:

Introduction

1. This lawsuit concerns the Nucentrix Broadband Networks Inc's loansharking through the collection of illegal and unenforceable fees from it customers in connection with its business of extending credit for the purchase of copyrighted television programs. In Texas, Oklahoma, Arkansas, Kansas, Missouri, Iowa, Illinois, Ohio, Indiana, Kentucky, and Pennsylvania Nucentrix Broadband Networks ("Nucentrix") sells its customers television programs, internet access and voice telephony on credit. The customer purchases the rights to watch the television programs and, if they want, reduce the television programs to tangible form – video tapes – and keep them in his or her possession for future use. There are no agreements concerning the sales which provide for a specified rate of interest.

2. The credit Nucentrix extends to its customers is a customer debt payable on a date certain to Nucentrix. The customer debt for purchase of the television programs is stated each month by invoice mailed the customer. If a customer is delinquent for 30 days in paying the debt, Nucentrix agrees to extend the time of payment of the debt for a fee – typically a $5.00 fee – incurred by the customer in consideration of Nucentrix's forbearance in collecting the debt for 30 days. Nucentrix takes no other action to collect the debt for 60 days after the debt becomes due. After non-payment of the debt for 80 days, the debt is forwarded to a third-party collection agency.

3. When the customer withholds payment of his or her monthly debt to Nucentrix for more than 30 days, Nucentrix charges the customer a fee – typically a $5.00 fee – for the customer's detention of the money he or she owes Nucentrix.

4. The debt the customers owe Nucentrix for providing them television programs is valued in money – a money debt owed to Nucentrix by the customer. When the customer fails to pay the money on time, the customer is using Nucentrix's money not his or her own money. If the customer does not pay the debt for 30 days, Nucentrix charges a fee – typically a $5.00 fee – as compensation for the use of Nucentrix's money.

5. Collection of these late fees is a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). The relief provided by RICO is particularly appropriate for this lawsuit because of RICO's nationwide reach to outlaw collection of unlawful debt. Nolen asks the court to enjoin further implementation of the collection of the unlawful debt and declare the practice illegal. Nolen

also asks the court to award him and the class members RICO damages and attorney fees and restore to him and the class members the amounts which Nucentrix and its controllers have illegally collected through its loansharking.

6. The class procedures provided by Federal Civil Procedure Rule 23 are particularly appropriate for this lawsuit because of the small individual damages – typically $5.00. As the Supreme Court wrote in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980), for the vast number of claimants, "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages."

Jurisdiction

7. This court has jurisdiction of this civil action under 18 U.S.C. § 1964(a) and (c), Racketeer Influenced and Corrupt Organizations Act ("RICO"), and federal question jurisdiction under 28 U.S.C. § 1331.

Definitions

8. As used in this complaint "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

9. As used in this complaint "a system provider" is a person or group of persons who provides wireless broadband products over a broadband network and, directly or through one or more affiliate, who owns or controls a license or authority to operate a broadband network, who owns a significant interest in such broadband network, or

who otherwise controls or is responsible for, through any arrangement, the management or operation of such a broadband network.

10. As used in this complaint "wireless broadband products" are video programs, internet access, or voice telephony.

11. As used in this complaint "broadband network" is a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to transmit wireless broadband products to multiple customers within a community.

12. As used in this complaint, "invoiced amount" means a debt incurred monthly by the customer for the credit sale of wireless broadband products by a system provider. Nucentrix advances credit to the customer for the invoiced amount which there is an absolute obligation to repay.

13. As used in this complaint "late fee" means a charge to a customer, imposed by the system provider and incurred by the customer, upon delinquency of payment of the invoiced amount, as compensation for the use, forbearance or detention of money. Each late fee is a debt which is unenforceable un [sic] State or Federal law, in whole or in part, as to principal or interest because of the laws relating to usury where the usurious rate is at least twice the enforceable rate; and which was incurred in connection with the business of lending money or a thing of value at a rate usurious under State or Federal law.

The Parties

THE PLAINTIFF

14. Plaintiff, John Nolen, is a citizen of Texas residing in Duval County and the Southern District of Texas. He has been a customer of Nucentrix and its predecessors since August, 1996. Nucentrix has collected a $5.00 late fee from him on at least two occasions within the four years preceding the filing of this complaint.

THE DEFENDANTS

The Providers

15. Defendant, Nucentrix Broadband Networks Inc, is a system provider who operates, manages, or controls, directly or indirectly, broadband networks located in the counties comprising the Laredo Division of the Southern District of Texas, including Webb County, Texas. Nucentrix is found in the Laredo Division in that its agents transact its business under the assumed name, Heartland Cable Television, at 2611 Loop 20, Laredo, Webb County, Texas 78403.

16. Nucentrix does business under the assumed names of Nucentrix Telecom, Heartland Cable Television, Nucentrix Broadband Networks, Nucentrix Internet Services, Nucentrix Spectrum, Nucentrix Telephony, Cyberwave Heartnet, and Clear Choice TV, and as such is amendable to suit, under Texas law, in its assumed names. Nucentrix changed its name from Heartland Wireless Communications Inc on April 1, 1999, when it emerged from a reorganization under Chapter 11 of the U.S. Bankruptcy Code.

17. Plaintiff's choice of venue as to Nucentrix as a system provider is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a).

Nucentrix Subsidiaries

18. At all times material Nucentrix operated its broadband networks by and through its subsidiaries. Nucentrix Internet Services Inc, Heartland Cable Television Inc, Nucentrix Spectrum Resources Inc, Wireless One Inc, CS Wireless Systems Inc, and 34 wholly owned subsidiaries, identified here as John Does 1-34, which carry on the same line of business as does Nucentrix. All the subsidiaries participate in the control of Nucentrix.

19. Plaintiff's choice of venue as to the subsidiaries, as the ends of justice require, is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

Nucentrix Owners, Officers, and Directors

20. Nucentrix is controlled in the operation of its broadband networks by its officers and directors, Curtis Henderson, Carroll D. McHenry, Marjean Henderson, Amy E. Ivanoff, Richard B. Gold, Terry S. Parker, Neil S. Subin, R. Ted Weschler, Robert S. Cecil, Jack R. Crosly, J.R. Holland Jr, John A. Sprague, and L. Allen Wheeler, and by its owners, Stephen Feinburg, Cerberus Partners LP, Cerberus International LTD, and Cerberus Institutional Partners LP, who hold the power of appointment of Nucentrix directors.

21. Plaintiff's choice of venue as to the owners, officers, and directors, as the ends of justice require, is

proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

Nucentrix's Associates

22. At all times material, these associates of Nucentrix participated in the operation and control of Nucentrix: DirecTV Inc, Hughes Electronics Corporation, General Motors Corporation, Cisco Systems Inc, Cross Country Wireless Inc, Rural Vision Joint Venture, ISP Alliance Inc, SBA Towers Inc, Wireless Enterprises LLC, and Peoples Choice TV Corp. They participated in the operation and control of Nucentrix through management services, price setting, supplying television programs, broadcasting radio signals, and negotiating programming and marketing services with suppliers of programming.

23. Plaintiff's choice of venue as to the associates, as the ends of justice requires, is proper in Laredo, Texas under the provisions of 18 U.S.C. § 1965(a) and (b).

Facts Regarding Nucentrix Transactions With Plaintiff

24. On November 27, 1999, Heartland Cable Television, as system provider, charged Nolen a late fee of $5.00 which he paid. The late fees Nolen paid are subject to Texas usury laws because they involve the use, forbearance or detention of money. There is a lending relationship between Nolen and Nucentrix because of Nucentrix's extension of credit to Nolen which created the debt of the invoiced amount.

Class Allegations

Plaintiff Class

25. This action is brought on behalf of a class consisting of all persons from whom any of the defendants or their affiliates or predecessors have collected a late fee.

26. Plaintiff seeks certification under Federal Rules of Civil Procedure 23(b)(1)(A) and 23(b)(2), or in the alternative or in addition, under Federal Rule of Civil Procedure 23(b)(3).

27. The class is so numerous that joinder of all members is impractical.

28. There are questions of law and fact common to the class, which questions predominate over any question affecting only individual class members.

29. Plaintiff's claim is typical of claims of the class members, in that they are based on the same legal and remedial theories.

30. Plaintiff, as class representative, will fairly and adequately protect the interests of the class. Neither plaintiff nor his counsel have any interest which might cause them to not vigorously pursue this action.

31. Certification is appropriate under Federal rule of Civil Procedure 23(b)(1)(A) because of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

32. Certification is appropriate under Federal Rule of Civil Procedure 23(b)(2) in that defendants have imposed uniform policies with respect to the entire class and

injunctive or declaratory relief against the imposition of the policies is necessary. The monetary relief sought, including statutory damages, does not detract from the cohesiveness of the class.

33. Alternatively or in addition, plaintiffs request certification under Federal Rule of Civil Procedure 23(b)(3). The questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The only individual questions concern the size of the late fee that was charged the member and the period of time for which the late fee was charged. This can be determined by a ministerial examination of the defendant's financial files.

34. A class action is superior to other methods for the fair and efficient adjudication of this dispute. Because most subscribers cannot recognize a charge or forbearance buried in defendants' invoices, the members will not realize they have a claim. Furthermore, even if a subscriber did recognize this claim, the size of the claims involved does not warrant individual litigation of the magnitude and complexity necessary to challenge the legality of the late charges.

35. Plaintiff seeks relief for members of the class on the same basis as he seeks relief for himself.

COUNT I

Use of Income from the Collection of Unlawful Debt in Operation of Enterprise

36. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

37. This claim for relief is asserted against all defendants, and arises under 18 U.S.C. 1962(a).

38. At all relevant times each defendant was a person within the meaning of 18 U.S.C. §§ 1961(3) and 1964(a), in that each defendant was capable of holding a legal or beneficial interest in property.

39. At all relevant times Nucentrix Broadband Wireless Networks, Inc. was an enterprise within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a). The enterprise is an ongoing corporation organized and existing under the laws of Delaware. The enterprise has engaged in, and its activities have affected interstate and foreign commerce through the use of the interstate mails, air waves, telephone lines, and coaxial cable.

40. Defendants, except the Cerberus-defendants, through the charge and receipt of late fees in connection with their business of advancing credit at a usurious rate, have engaged in the collection of unlawful debt, where the usurious rate is at least twice the enforceable rate, and which generated income for each of them. SBA Towers, Inc., DirecTV, Inc., Hughes Electronics Corporation, General Motors Corporation, Wireless One, Inc., CS Wireless Systems, Inc., Cross Country Wireless, Inc., and Wireless Enterprises LLC acted as willful principals in the collection of this unlawful debt.

41. Defendants have used their illicit income in the operation of the enterprise, in that part of the money each defendant has earned by participation in the collection of unlawful debt has been paid to the enterprise and used to operate the enterprise.

42. Plaintiffs have been injured in their business and property by reason of defendants' use or investment of income from the collection of unlawful debt in the operation and control of the enterprise, and because plaintiffs have been required to pay illegal and unenforceable late fee payments as a condition to receiving wireless broadband products. In absence of defendants' violation of 18 U.S.C. § 1962(a), the payments for delinquency in payment of service fees would have been substantially reduced. Under the provisions of 18 U.S.C. 1964(c), plaintiffs are entitled to bring this action and to recover from defendants treble damages, the costs of bringing this suit, and reasonably [sic] attorney fees.

COUNT II

Conducting and Participating in the Conduct of Enterprise's Affairs

43. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

44. This claim for relief is asserted against all defendants except Nucentrix Broadband Networks Inc and arises under 18 U.S.C. 1962(c).

45. At all relevant times each defendant was a person within the meaning of 18 U.S.C. §§ 1961(3) and 1964(a), as each defendant was capable of holding a legal or beneficial interest in property.

46. At all relevant times Nucentrix Broadband Networks Inc constituted an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c). The enterprise is an ongoing corporation organized and existing under the laws of Delaware, and is distinct from each of

the other defendants. The enterprise has engaged in, and its activities have affected interstate and foreign commerce through the use of the interstate mails, air waves, telephone lines, and coaxial cable.

47. Defendants, except for Nucentrix Broadband Networks Inc, including the Cerberus-defendants and Cisco Systems, Inc., while under the control and direction of the enterprise assisting in the operation or management of the enterprise, have participated in the enterprise's business activities which result in the charge and receipt of late fees and, therefore have engaged in the collection of unlawful debt from the enterprise's customers.

48. Defendants, except for Nucentrix Broadband Networks Inc, including the Cerberus-defendants, have conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through collection of unlawful debt.

49. Plaintiff has been injured in his business and property by reason of such defendants' violations of 18 U.S.C. § 1962(c), because plaintiffs have been required to make illegal and unenforceable late fee payments as a condition to receiving wireless broadband products. In absence of defendants' violation of 18 U.S.C. § 1962(c), the payments for delinquency in payment of service fees would have been substantially reduced. Under the provisions of 18 U.S.C. 1964(c), plaintiff is entitled to bring this action and to recover treble damages, the costs of bringing this suit, and reasonably [sic] attorney fees.

COUNT III

Conspiracy

50. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

51. This claim for relief is asserted against all defendants, and arises under 18 U.S.C. 1962(d).

52. At all relevant times each defendant was a person within the meaning of 18 U.S.C. §§ 1961(3) and 1964(a), in that each defendant was capable of holding a legal or beneficial interest in property.

53. At all relevant time Nucentrix Broadband Wireless Networks, Inc. was an enterprise within the meaning of 18 U.S.C. § 1961(4). The enterprise has engaged in, and its activities have affected interstate and foreign commerce through the use of the interstate mails, air waves, telephone lines, and coaxial cable.

54. Each of the subsidiary-defendants and the officer/director defendants intentionally agreed with and conspired with Nucentrix to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through collection of unlawful debt.

55. Each of DirecTV Inc, Hughes Electronics Corporation, and General Motors Corporation intentionally agreed with and conspired with Nucentrix to use, directly or indirectly, income or proceeds of such income earned by participation in the collection of unlawful debt, in the operation of the enterprise.

56. Plaintiff has been injured in his business and property by reason of such defendants' violations of 18 U.S.C. § 1962(c), because plaintiffs have been required to

make illegal and unenforceable late fee payments as a condition to receiving wireless broadband products. In absence of defendants' violation of 18 U.S.C. § 1962(c), the payments for delinquency in payment of service fees would have been substantially reduced. Under the provisions of 18 U.S.C. § 1964(c), plaintiff is entitled to bring this action and to recover treble damages, the costs of bringing this suit, and reasonably [sic] attorney fees.

COUNT IV

Injunctive and Declaratory Relief to Prevent RICO Violations

57. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

58. Under the provisions of 18 U.S.C. 1964(a), plaintiffs are entitled to bring this action to enjoin and declare unlawful the defendants' acts committed in the collection of unlawful debt.

COUNT V

Restitution of Late Fees Which Unjustly Enrich Defendants

59. Plaintiff restates and incorporates all the preceding paragraphs of this complaint.

60. Defendants have been and will be unjustly enriched at the expense of the plaintiff by the charge and receipt of late fees.

61. In equity and good conscience, it would be unjust for defendants to enrich themselves at the expense of the plaintiff.

62. Because plaintiff has been required to make illegal late fee payments as a condition to receiving cable television service and equipment, he is entitled to full restitution of all fees wrongfully acquired by defendants by means of collection of unlawful debt.

63. Plaintiffs are entitled under the principles of equity to an order of the court that defendants hold in trust as constructive trustees whatever money they received or will receive, to the extent that the money is an unjust benefit or enrichment accruing to the defendants by their intentional acts in collecting an unlawful debt from plaintiffs, for the use and benefit of the plaintiffs, and that the plaintiff be declared the owner of the monies so collected.

Nucentrix's Bankruptcy Stay and Discharge

64. Not withstanding any allegation to the contrary, the relief sought against Nucentrix Broadband Networks Inc by virtue of this complaint is hereby abandoned as though never sought if such relief operates as a violation of the automatic stay of December 4, 1998, of the U.S. Bankruptcy Court, District of Maryland, in favor of Nucentrix Broadband Networks Inc, unless such relief is excepted from discharge by U.S. Bankruptcy Code § 523.

Evidentiary Support

65. The allegations and other factual contentions contained in paragraphs 1-4, 12, 13, 15, 16, 18, 20, 22, 27, 36, 38, 40, 43, 47, 48, 50, 54, 55, 57, and 59 are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Request for Relief

Nolen, on his behalf and on behalf of the class members, requests relief and judgment against defendants as follows:

1. For equitable relief of injunction, disgorgement, payment of restitution to all members of the class, and imposition of constructive trust.

2. For award of compensation to plaintiff and the class for damages caused by defendants' actions in violation of law, together with interest and costs.

3. For award of treble damages pursuant to 18 U.S.C. § 1964(c).

4. For award to plaintiff and the class members of reasonable attorney fees.

5. For such other and further relief as this court may deem equitable, just and proper.

Respectfully submitted,

/s/ Bryan Powers
Bryan Powers
SBN: 16215700
4748A FM624
Robstown, TX 78380
TEL: 361-937-8009
Fax: 361-937-6066
Attorney-in-Charge
for Plaintiff

PLAINTIFF'S DEMAND FOR JURY TRIAL

Plaintiff, John Nolen, asserts his rights under the Seventh Amendment to the U.S. Constitution and demands a trial by jury on all issues, in accordance with Federal Rule of Civil Procedure 38.

/s/ Bryan Powers
Bryan Powers

CERTIFICATE OF SERVICE

I certify that I served the following persons with the foregoing document on May 28, 2001, by first class mail.

Jeffrey R. Bragalone
300 Crescent Court, Suite 1500
Dallas, TX 75201

Mike Mills
P.O. Drawer 3725, 818 Pecan
McAllen, TX 78502

John E. Eichman
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202

Patricia O'Connell Alvarez
415 Shiloh Drive
Laredo, TX 78045

John A. Kazen
P.O. Box 6237
Laredo, TX 78042

Barry C. Barnett
901 Main Street, Suite 4100
Dallas, Texas 75202-3775

William B. Dawson
2001 Ross Avenue, 3700 Trammell Crow Center
Dallas, Texas 75201

/s/ Bryan Powers
Bryan Powers

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JOHN NOLEN, *individually and on behalf of all persons similarly situated,* Plaintiff,	§	CIVIL ACTION NO. L-00-CV-134
vs.	§	JURY TRIAL DEMANDED
NUCENTRIX BROADBAND NETWORKS, INC., *et al.* (specified below), Defendants.	§	

PLAINTIFF'S NOTICE OF APPEAL

(Filed Jul. 13, 2001)

To the Honorable Clerk of the Court:

NOTICE is hereby given that Plaintiff John Nolen, individually and on behalf of all persons similarly situated ("Nolen"), that he hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of Dismissal (Docket No. 50) entered in this case on June 14, 2001. Plaintiff hereby tenders one original and one copy of this notice for the Court's files, as well as seven (7) copies of this notice to serve upon the seven law firms representing the Defendants, so you can serve copies of the notice on all parties and counsel.

Plaintiff also forwards his attorney's check in the amount of $105.00 to cover the Fifth Circuit Docketing Fee

and the District Court filing fee pursuant to FED. R. APP. P. 3(e) and 5th CIR. R. 3.

This Notice of Appeal refers to Plaintiff's claims against all named Defendants, that is, to all of the parties listed on the District Court's Order of Dismissal and reprinted below:

A. Nucentrix Broadband Networks, Inc., a/k/a Heartland Wireless Communications, Inc., its marks and assumed names

B. Nucentrix Telecom;

C. Heartland Cable Television, Inc.;

D. Nucentrix Broadband Networks;

E. Nucentrix Internet Services, Inc. a/k/a Nucentrix Internet Services;

F. Nucentrix Spectrum;

G. Nucentrix Telephony;

H. Cyberwaves Heartnet;

I. Clear Choice TV, and its subsidiaries

J. Heartland Cable Television, Inc.;

K. Nucentrix Spectrum Resources, Inc.;

L. Wireless One Inc.;

M. CS Wireles Systems, Inc.;

N. CAI Wireless Systems, Inc.;

O. Unidentified Parties 10-34;

P. Nucentrix Broadband Networks, Inc.'s owners, that is, Stephen Feinburg;

Q. Cerberus Partners L.P.;

R. Cerberus Int'l Ltd.;

S. Cerberus Institutional Partners, L.P., its joint ventures and alliance members;

T. DIRECTV, INC.;

U. Hughes Electronics Corp.;

V. GM Corp.;

W. Cisco Systems Inc.;

X. Cross County Wireless, Inc.;

Y. Rural Vision Joint Venture, its officers and directors;

Z. Carroll D. McHenry;

AA. Marjean Henderson;

BB. Amy E. Ivanoff;

CC. Richard B. Gold;

DD. Terry S. Parker;

EE. Neil S. Subin;

FF. R. Ted Weschler;

GG. Robert S. Cecil;

HH. Jack R. Crosly;

II. J.R. Holland, Jr.;

JJ. John A. Sprague;

KK. L. Allen Wheeler;

LL. ISP Alliance, Inc.;

MM. SBA Towers, Inc.;

NN. Wireless Enterprises, L.L.C.; and

OO. People's Choice TV Corp.

Respectfully submitted,

/s/ Bryan Powers by
David A. Furlow with
Permission
BRYAN POWERS
ATTORNEY-IN-CHARGE FOR
PLAINTIFF
LAW OFFICES OF
BRYAN A. POWERS
Texas Bar No. 16215700
Southern District Bar No. 2439
4748A FM 624
Robstown, TX 78380
Telephone: (361) 767-9970
Telefax: (361) 767-9971

/s/ David A Furlow
DAVID A. FURLOW
State Bar No. 07555580
600 Jefferson, Suite 800
Houston, Texas 77002
Telephone:
(713) 659-8697
Facsimile:
(713) 659-3020

Attorneys for Plaintiff,
John Nolen, individually
and on behalf of all
persons similarly
situated.

OF COUNSEL:

MORRIS & CAMPBELL
A Professional Corporation
600 Jefferson, Suite 1617
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that a copy of this PLAINTIFF'S NOTICE OF APPEAL was served on the following persons by certified mail, postage prepaid, return receipt requested, as indicated below, in accordance with FED. R. CIV. P. 5(b) on July 12, 2001:

Jeffrey R. Bragalone
300 Crescent Court, Suite 1500
Dallas, TX 75201

Mike Mills
P.O. Drawer 3725, 818 Pecan
McAllen, TX 78502

John C. Eichmann
1445 Ross Ave., Suite 3200
Dallas, TX 75202

Patricia O'Connell Alvarez
415 Shiloh Drive
Laredo, TX 78045

John A. Kazen
P.O. Box 6237
Laredo, TX 78042

Barry C. Barnett
901 Main Street, Suite 4100
Dallas, TX 75202-3775

William B. Dawson
2001 Ross Ave.,
3700 Trammell Crow Center
Dallas, Texas 75201

/s/ David A. Furlough
David A. Furlow

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 02-0492

In The
Supreme Court of the United States

JOHN NOLEN, individually and on behalf of all persons similarly situated,

Petitioner,

vs.

NUCENTRIX BROADBAND NETWORKS, INC., a/k/a Heartland Wireless Communications, Inc., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER L. SKOLNIK
Counsel of Record
LAWRENCE M. ROLNICK
SHEILA A. SADIGHI
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
Telephone: (973) 597-2500
Facsimile: (973) 597-2400

Attorneys for Cerberus Respondents

JEFFREY R. BRAGALONE
Counsel of Record
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Attorneys for Nucentrix Respondents

[Additional Names Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Cerberus Respondents:

Cerberus Partners, L.P.,
Cerberus International, Ltd.,
Cerberus Institutional Partners, L.P.,
and Stephen Feinberg

Nucentrix Respondents:

Nucentrix Broadband Networks, Inc.
on behalf of and as next friend of its trademarks,
trademark applications, and alleged assumed names –
Nucentrix Telecom, Heartland Cable Television,
Nucentrix Broadband Networks, Nucentrix Internet
Services, Nucentrix Spectrum, Nucentrix Telephony,
Cyberwave Heartnet, and Clear Choice TV –
Nucentrix Internet Services, Inc., Heartland Cable
Television, Inc., Nucentrix Spectrum Resources, Inc.,
Jack R. Crosby (incorrectly named as Jack R. Crosly),
Marjean Henderson, J. R. Holland, Jr., John A. Sprague,
L. Allen Wheeler, Richard B. Gold, Amy E. Ivanoff,
Carroll D. McHenry, Terry S. Parker, Neil S. Subin,
and R. Ted Weschler

QUESTIONS PRESENTED

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to question 1 presented by Petitioner because it seeks consideration of a question not accurately reflecting the proceedings or holding below. If the Court grants the Petition based on question 1, Respondents submit that the following is a more accurately phrased question:

> WHETHER THE FIFTH CIRCUIT CORRECTLY AFFIRMED DISMISSAL OF PETITIONER'S CASE WHERE IT HELD THAT THE $3.00 TO $5.00 FIXED ADMINISTRATIVE OR LATE FEES CHARGED DID NOT CONSTITUTE INTEREST UNDER TEXAS LAW AND ACCORDINGLY WERE NOT USURIUS AS A MATTER OF LAW, AND THAT THEREFORE PETITIONER HAD FAILED, AS A MATTER OF LAW, TO PLEAD THAT RESPONDENTS COLLECTED AN "UNLAWFUL DEBT" AS THAT TERM IS DEFINED IN RICO 18 U.S.C. § 1961(6), THE ALLEGED PREDICATE ACT TO PETITIONER'S RICO CLAIMS.

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to questions 2 and 3 presented by Petitioner because those questions seek consideration of questions not appropriately arising from or otherwise accurately reflecting the proceedings or holding below, and therefore would not properly be before the Court if certiorari were granted.

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to question 4 presented by Petitioner because it seeks consideration of a question not accurately reflecting the proceedings or holding below. If the Court grants the Petition based on question 4, Respondents submit that the following is a more accurately phrased question:

QUESTIONS PRESENTED – Continued

WHETHER THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONER'S CLAIM UNDER 18 U.S.C. § 1962(a) WHERE IT HELD THAT (i) NO CLAIM EXISTS UNDER § 1962(a) FOR INJURY ARISING SOLELY FROM PREDICATE RACKETEERING ACTS THEMSELVES BECAUSE § 1962(a) DOES NOT PROHIBIT SUCH ACTS; (ii) ANY INJURY UNDER § 1962(a) MUST FLOW FROM THE USE OR INVESTMENT OF RACKETEERING INCOME; and (iii) THE PETITIONER ALLEGED INJURY ARISING SOLELY FROM NUCENTRIX'S ASSESSMENT AND COLLECTION OF LATE FEES, NOT FROM NUCENTRIX'S USE OR INVESTMENT OF THOSE FEES.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents herein respectfully submit this Corporate Disclosure Statement.

Respondent Cerberus Partners, L.P. is not a nongovernmental corporation, but a privately held limited partnership. Respondent Cerberus Partners, L.P. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus Partners, L.P.

Respondent Cerberus International, Ltd., is a nongovernmental privately held company. Respondent Cerberus International, Ltd. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus International, Ltd.

Respondent Cerberus Institutional Partners, L.P. is not a nongovernmental corporation, but a privately held limited partnership. Respondent Cerberus Institutional Partners, L.P. has no parent corporation, and no publicly held company holds more than a 10% share of Cerberus Institutional Partners, L.P.

Respondent Nucentrix Broadband Networks, Inc. (a/k/a Heartland Wireless Communications, Inc.) is a publicly traded company on NASDAQ. No parent corporation or other publicly held company owns more than 10% of Nucentrix Broadband Networks, Inc. Nucentrix Broadband Networks, Inc., is the parent or holding company of the following Respondents:

Respondent Nucentrix Telecom (correct name is Nucentrix Telecom Services, Inc.) is 100% owned by Nucentrix Broadband Networks, Inc.

CORPORATE DISCLOSURE STATEMENT – Continued

Respondent Heartland Cable Television, Inc. is 100% owned by Nucentrix Broadband Networks, Inc.

Respondent Nucentrix Internet Services, Inc. (also, Nucentrix Internet Services) is 100% owned by Nucentrix Broadband Networks, Inc.

Respondent Nucentrix Spectrum Resources, Inc. (also, Spectrum Resources, Inc.) is 100% owned by Nucentrix Broadband Networks, Inc.

Respondents Nucentrix Telephone, Cyberwave Heartnet, and Clear Choice TV are not corporate entities.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION F0R WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	1
Petitioner's Claims	2
The Fifth Circuit's Affirmance of the District Court's Dismissal of Petitioner's Claims	2
REASONS FOR DENYING THE WRIT	4
I. THE COURT OF APPEALS' DECISION AFFIRMING THE DISMISSAL OF PETITIONER'S RICO CLAIMS PREDICATED ON THE COLLECTION OF AN "UNLAWFUL DEBT" RESTS SQUARELY ON THE INTERPRETATION AND APPLICATION OF TEXAS STATE USURY LAW, AND THEREFORE DID NOT DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	6
II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION ON THE AVAILABILITY OF INJUNCTIVE OR DECLARATORY RELIEF TO PRIVATE PARTIES UNDER RICO, BECAUSE PETITIONER'S CLAIM FOR INJUNCTIVE OR DECLARATORY RELIEF WAS MOOT AND THE FIFTH CIRCUIT NEVER REACHED THE ISSUE	8

TABLE OF CONTENTS – Continued

Page

III. THE DECISION BELOW DOES NOT PRESENT A COMPELLING REASON FOR GRANTING THE PETITION BECAUSE ALTERNATE GROUNDS FOR AFFIRMING THE DISMISSAL OF PETITIONER'S CLAIMS EXIST THAT ARE NOT BEFORE THIS COURT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al., 293 F.3d 926 (5th Cir. 2002).....*passim*

Rivera v. AT&T Corp., No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002)..... 3

Rivera v. AT&T Corporation, 147 F. Supp.2d 719 (S.D. Tex. 2001), *aff'd sub nom. Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002).....2, 3, 10

STATUTES

18 U.S.C. §§ 1961-1968.....2, 6

18 U.S.C. §§ 1961(3).....11

18 U.S.C. § 1961(6) 3, 6, 7, 10, 11

18 U.S.C. § 1962.....3, 8, 10, 11

18 U.S.C. § 1962(a) 4

18 U.S.C. § 1962(c)..... 4

18 U.S.C. § 1962(d) 4

18 U.S.C. § 1964(a) 3, 8

18 U.S.C. § 1964(c).....3, 8

OTHER AUTHORITIES

Sup. Ct. R. 10.....5, 8, 9, 11

Sup. Ct. R. 15.2..... 1

Sup. Ct. R. 24.2..... 1

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Cerberus Partners, L.P., Cerberus International, Ltd., Cerberus Institutional Partners, L.P., and Stephen Feinberg (collectively, the "Cerberus Respondents"), and Respondents Nucentrix Broadband Networks, Inc. on behalf of and as next friend of its trademarks, trademark applications, and alleged assumed names – Nucentrix Telecom, Heartland Cable Television, Nucentrix Broadband Networks, Nucentrix Internet Services, Nucentrix Spectrum, Nucentrix Telephony, Cyberwave Heartnet, and Clear Choice TV – Nucentrix Internet Services, Inc., Heartland Cable Television, Inc., Nucentrix Spectrum Resources, Inc., Jack R. Crosby (incorrectly named as Jack R. Crosley), Marjean Henderson, J. R. Holland, Jr., John A. Sprague, L. Allen Wheeler, Richard B. Gold, Amy E. Ivanoff, Carroll D. McHenry, Terry S. Parker, Neil S. Subin, and R. Ted Weschler (collectively, the "Nucentrix Respondents") request that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by John Nolen, individually and on behalf of all persons similarly situated, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 26, 2002.

STATEMENT OF THE CASE

Pursuant to Sup. Ct. R. 15.2 and 24.2, Respondents object to Petitioner's Statement of the Case because it omits or otherwise misstates certain pertinent facts and rulings of law that bear on what issues properly would be before the Court if certiorari were granted. The following

additional matters should be considered by the Court in ruling on the Petition.

Petitioner's Claims

Petitioner's Original Complaint and Amended Complaint filed in the United States District Court for the Southern District of Texas alleged that Respondents violated RICO, 18 U.S.C. §§ 1961-1968, by collecting unlawful debts under Texas state usury law. (Pet. at 4) This case turns entirely on Petitioner's inability as a matter of law – as determined by both the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit – to plead facts sufficient to allege a violation of Texas state usury law.

The Fifth Circuit's Affirmance of the District Court's Dismissal of Petitioner's Claims

On June 13, 2001, the United States District Court for the Southern District of Texas dismissed Petitioner's Original and Amended Complaints, with prejudice, for the reasons set forth in its decision in the nearly identical case *Rivera v. AT&T Corporation*, 147 F. Supp.2d 719 (S.D. Tex. 2001), *aff'd sub nom. Rivera v. AT&T Corp.*, No. 01-409053 (5th Cir. March 25, 2002), *rhg. en banc denied* (5th Cir. April 29, 2002). The Fifth Circuit reviewed the District Court's dismissal of Petitioner's claims *de novo. Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al.*, 293 F.3d 926 (5th Cir. 2002). It affirmed the dismissal for three reasons, the first of which alone was dispositive of Petitioner's claims in their entirety.

First, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here, are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen,* 293 F.3d at 929. The Fifth Circuit held that its earlier-issued summary affirmance of the District Court's *Rivera* decision, "[f]or the reasons stated by the district court", *Rivera v. AT&T Corp.,* No. 01-409053 (5th Cir. March 25, 2002) (unpublished), *rhg. en banc denied* (5th Cir. April 29, 2002), was controlling in that regard.

Because Petitioner's RICO claims were predicated on the alleged collection of "unlawful debts," as defined under 18 U.S.C. § 1961(6), the Fifth Circuit held that Petitioner had to demonstrate, *inter alia*, "that Nucentrix . . . collected a debt that was unenforceable under Texas usury laws". *Nolen,* 293 F.3d at 929. Because it found that the facts pled failed, as a matter of law, to allege a violation of Texas state usury law, the Fifth Circuit held that Petitioner "failed, as a matter of law, to establish that Nucentrix collected an 'unlawful debt.'" *Id.*

Because the Fifth Circuit found that there was no "unlawful debt" – and therefore no violation of 18 U.S.C. § 1962 – it never reached the issue of whether injunctive and declaratory relief is available to private parties under 18 U.S.C. §§ 1964(a) and (c) to prevent and restrain violations of section 1962. Nor did the Fifth Circuit need to reach any alternative grounds for dismissal of Petitioner's RICO claims in the District Court, including that "the facts that have been alleged demonstrate that [Respondents] are not engaged in a RICO enterprise." *Rivera*, 147 F. Supp.2d at 725.

Second, the Fifth Circuit held that for claims arising under 18 U.S.C. § 1962(a), alleging an injury solely from the predicate racketeering acts themselves is not sufficient. *Id.* Instead, the Court held, "any injury must flow from *the use or investment of racketeering income.*" *Id.* (emphasis added in original) (citation omitted). The Court found that the facts pled alleged Petitioner's injury arose "solely from Nucentrix's assessment and collection of late fees, not from Nucentrix's use or investment of those fees." *Id.* For this reason as well, the Court held that Petitioner had failed to assert a valid claim under U.S.C. § 1962(a). *Id.* at 929-30.

Finally, the Fifth Circuit affirmed the dismissal of Petitioner's claim under 18 U.S.C. § 1962(d) for conspiracy to violate §§ 1962(a) and (c). The Court held that Petitioner's "failure to plead the requisite elements of either a § 1962(a) or a § 1962(c) violation implicitly means that [Petitioner] cannot plead a conspiracy to violate either section." *Id.* at 930 (citation omitted).

REASONS FOR DENYING THE WRIT

This case turns entirely on Petitioner's inability as a matter of law, as determined by both the Fifth Circuit and the District Court for the Southern District of Texas, to plead facts sufficient to allege a violation of Texas state usury law. Because the Fifth Circuit's analysis of the facts and its interpretation of Texas state law provided a complete basis for affirming the District Court's dismissal of Petitioner's claims, that Court's decision (i) did not decide an important, unsettled question of federal law, (ii) is not in conflict with a decision of another court of appeals, and

(iii) does not present a compelling reason for granting the Petition. Sup. Ct. R. 10(a), (c).

The carefully constructed Petition for Writ of Certiorari attempts to veil this fact through misleading presentations of the proceedings and holdings below. Presumably aware that the character of the proceedings below would not support a grant of the Petition, Petitioner attempts to bootstrap his case to an issue that this Court has decided to consider – whether injunctive and declaratory relief is available to private parties under RICO. However, that issue was not decided upon below.

Unless this Court were first to reverse both the Fifth Circuit's analysis of the facts alleged and its interpretation of Texas state usury law – the real issues underlying Petitioner's first question presented – it could not reach the other purported questions presented. Nor could any decision rendered by this Court on the propriety of injunctive or declaratory relief for private parties in Civil RICO actions affect the outcome of the decision below. Accordingly, Petitioner has failed to present a compelling reason to grant the writ, and the Petition should be denied. Sup. Ct. R. 10.

I. THE COURT OF APPEALS' DECISION AFFIRMING THE DISMISSAL OF PETITIONER'S RICO CLAIMS PREDICATED ON THE COLLECTION OF AN "UNLAWFUL DEBT" RESTS SQUARELY ON THE INTERPRETATION AND APPLICATION OF TEXAS STATE USURY LAW, AND THEREFORE DID NOT DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioner has made two assertions in its Petition that demonstrate the lack of a compelling reason to grant the writ. First, Petitioner's Original Complaint and Amended Complaint both "alleged that Respondents violated RICO, 18 U.S.C. §§ 1961-1968, by collecting unlawful debts under Texas usury law". (Pet. at 4) Second, that "[i]n this case, to properly plead a case based upon a collection of unlawful debt, [Petitioner] had to show that Nucentrix . . . collected a debt that was unenforceable under Texas usury laws. . . . " (Pet. at 12)

In the decision below, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here, are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen, et al. v. Nucentrix Broadband Networks, Inc., et al.*, 293 F.3d 926, 929 (5th Cir. 2002). Accordingly, the Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) – by Petitioner's own admission, a *sine qua non* of its RICO claims.

Petitioner characterizes the interpretation of Texas law by the Fifth Circuit as an error harmful to national

jurisprudence. Petitioner asserts that this Court should grant a writ of certiorari to address "the unresolved issue of what constitutes an unlawful debt actionable under the RICO statute." (Pet. at 10) However, what constitutes an unlawful debt under RICO is not "unresolved." It is expressly, concisely and unmistakably defined by the statute, in part, as a "debt . . . incurred or collected . . . which is unenforceable under State . . . law . . . because of the laws relating to usury . . . ." 18 U.S.C. § 1961(6).

That the Fifth Circuit did not decide differently is evident from the Petition. After its conclusory claim that the Fifth Circuit erred in its analysis of federal RICO law, Petitioner devotes its argument to the Court's application of the Texas Finance Code to the factual allegations. (Pet. at 12-16) Petitioner attempts to dress up this purely state law issue into one of "nationwide" importance based on the Fifth Circuit's alleged error in purportedly ignoring "charging-usury" cases in favor of "contracting-usury" cases. (Pet. at 16) This argument is a red herring. Petitioner relies on a Texas Supreme Court decision for the proposition that "[u]sury is contracting for, *charging*, or receiving interest in excess of a lawful amount." (Pet. at 12-13) (citation omitted) (emphasis added by Petitioner). Petitioner conveniently ignores the specific holding of the Fifth Circuit that the fixed administrative or late fees alleged here are "not regarded as *interest* under Texas law. . . . " *Nolen,* 293 F.3d at 929 (emphasis added). Accordingly, whether those fees were "contracted for" or "charged" is irrelevant.

The Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18

U.S.C. § 1962. That holding was the simple and necessary result of the Court's determination that the late fees at issue were not interest as a matter of Texas law, and therefore the facts pled did not allege a violation of Texas state usury law. Accordingly, the decision below did not decide an important, unsettled question of federal law, and, as such, Petitioner has failed to present a compelling reason for granting the writ. Sup. Ct. R. 10.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION ON THE AVAILABILITY OF INJUNCTIVE OR DECLARATORY RELIEF TO PRIVATE PARTIES UNDER RICO, BECAUSE PETITIONER'S CLAIM FOR INJUNCTIVE OR DECLARATORY RELIEF WAS MOOT AND THE FIFTH CIRCUIT NEVER REACHED THE ISSUE.

Because the Fifth Circuit held, on the grounds described above, that Petitioner failed as a matter of law to allege any violation of 18 U.S.C. § 1962, it never reached the issue on which Petitioner seeks this Court's review. Specifically, the Fifth Circuit did not – and properly could not – decide whether injunctive or declaratory relief is available to private parties under 18 U.S.C. §§ 1964(a) and (c), because those provisions are predicated on the existence of violations of section 1962. 18 U.S.C. §§ 1964(a), (c).

Petitioner's tortured characterizations of the Fifth Circuit's decision cannot succeed to put this issue properly before the Court. Before the issue was reached, it was rendered moot by the Fifth Circuit's holding that Petitioner had not alleged a violation of section 1962. Accordingly, it cannot seriously be contended that the Fifth

Circuit "refus[ed] to recognize . . . the validity of Nolen's claims for injunctive and declaratory relief [and therefore] widen[ed] the divide between the circuits on this very important issue . . . of whether injunctive relief is available to a private plaintiff bringing a civil action under RICO." (Pet. at 8)

Because the Fifth Circuit did not decide the issue, the decision below is not in conflict with any decisions that actually address the issue. Accordingly, Petitioner has failed to present a compelling reason for granting the writ. Sup. Ct. R. 10. In addition, because the Fifth Circuit did not decide the issue, Petitioner's Questions Presented numbers 2 and 3 seek consideration of questions not appropriately arising from or otherwise accurately reflecting the holding below. As such, those questions would not properly be before the Court if certiorari were granted.

III. THERE IS NO COMPELLING REASON FOR GRANTING THE PETITION BECAUSE ALTERNATE GROUNDS FOR AFFIRMING THE DISMISSAL OF PETITIONER'S CLAIMS EXIST THAT ARE NOT BEFORE THIS COURT.

There is no compelling reason for this Court to grant the Petition. Even if the Court were to grant the Petition, reverse the Fifth Circuit's interpretation of Texas state usury law, reach the other purported questions presented and remand the case, the dismissal of Petitioner's claims could still be summarily affirmed on alternate dispositive grounds not before this Court on the Petition.

In the decision below, the Fifth Circuit held that fixed administrative or late fees, such as the ones at issue here,

are "not regarded as interest under Texas law" and therefore are "not usurious as a matter of law" under Texas state law. *Nolen,* 293 F.3d at 929. As a result, the Fifth Circuit held that Petitioner had failed, as a matter of law, to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18 U.S.C. § 1962.

Because that holding in and of itself supported the affirmance of the District Court's dismissal of Petitioner's claims, the Fifth Circuit did not have to reach, and in fact did not reach, additional grounds dispositive as to all or some of the Respondents. One such fully dispositive alternate ground addressed by the District Court but not reached by the Court of Appeals was that "the facts that have been alleged demonstrate that [Respondents] are not engaged in a RICO enterprise." *Rivera*, 147 F. Supp.2d at 725.

Additional grounds not reached below support the disposition of Petitioner's claims against the Cerberus Respondents. For example, that Petitioner's claims against the Cerberus Respondents, based solely on their status as minority shareholders with the ability to appoint directors of the alleged corporate enterprise, were properly dismissed because Petitioner (i) failed to plead that the Cerberus Respondents had any role in the alleged misconduct in this case; (ii) failed to connect the Cerberus Respondents to the alleged misconduct in any specific way; and (iii) failed to plead facts that would enable Petitioner to pierce the corporate veil of Nucentrix.

Additional grounds not reached below support the disposition of Petitioner's claims against certain of the Nucentrix Respondents. For example, that Petitioner's

claims were properly dismissed as to Nucentrix's trademarks or assumed names – which are merely property rights, incapable of holding a legal or beneficial interest in property – because they do not constitute "persons," given the definition of "person" in 18 U.S.C. § 1961(3) as an "individual or entity capable of holding a legal or beneficial interest in property."

The Fifth Circuit held that based on its interpretation of Texas state usury law, Petitioner had failed as a matter of law to establish that Nucentrix collected an "unlawful debt" within the meaning of 18 U.S.C. § 1961(6) as required to support its allegations of a violation of 18 U.S.C. § 1962. That holding was dispositive of all of Petitioner's RICO claims, and rendered unnecessary the Fifth Circuit's consideration of additional, alternate grounds on which the dismissal of Petitioner's claims could still be affirmed, even if this Court were to grant the Petition.

Because any decision rendered by this Court could, potentially, have no impact on the ultimate affirmance by the Fifth Circuit of the dismissal of Petitioner's claims, there is no compelling reason to grant the Petition. Sup. Ct. R. 10. The granting of the Petition in this case would advance neither this Court's ability to manage its appellate docket, nor the principles of efficiency that underlie Supreme Court Rule 10. Accordingly, Respondents respectfully submit that the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Cerberus Respondents and the Nucentrix Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PETER L. SKOLNIK
Counsel of Record
LAWRENCE M. ROLNICK
SHEILA A. SADIGHI
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
Telephone: (973) 597-2500
Facsimile: (973) 597-2400

Attorneys for Respondents
Cerberus Partners, L.P.,
Cerberus International, Ltd.,
Cerberus Institutional Partners,
L.P., and Stephen Feinberg

JEFFREY R. BRAGALONE
Counsel of Record
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Attorneys for Respondents
Nucentrix Broadband Networks, Inc. on behalf of and as next friend of its trademarks, trademark applications, and alleged assumed names – Nucentrix Telecom, Heartland Cable Television, Nucentrix Broadband Networks, Nucentrix Internet Services, Nucentrix Spectrum, Nucentrix Telephony, Cyberwave Heartnet, and Clear Choice TV – Nucentrix Internet Services, Inc., Heartland Cable Television, Inc., Nucentrix Spectrum Resources, Inc., Jack R. Crosby (incorrectly named as Jack R. Crosly), Marjean Henderson, J. R. Holland, Jr., John A. Sprague, L. Allen Wheeler, Richard B. Gold, Amy E. Ivanoff, Carroll D. McHenry, Terry S. Parker, Neil S. Subin, and R. Ted Weschler